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# ONTARIO LABOUR RELATIONS BOARD REPORTS



**April 1992**





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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1992] OLRB REP. APRIL**

**EDITOR: RON LEBI**



Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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**2104-91-FC The Canadian Union of Public Employees and its Local 3501, Applicant v. The Boys' Home, Respondent**

Adjournment - First Contract Arbitration - Practice and Procedure - Employer seeking adjournment on grounds that its counsel had been its spokesperson in negotiations and anticipated being in position of both witness and counsel at the Board hearing - Adjournment request denied - Board finding that employer's positions on monetary issues, its attempts to limit opportunity for arbitral review of employer decisions and to undermine just cause protection and recognition of seniority representing underlying refusal to recognize union's bargaining authority - Various employer proposals, including two-tier wage proposal taken without reasonable justification - Employer failing to make reasonable or expeditious efforts to conclude collective agreement - Board directing first contract arbitration

**BEFORE:** *M. A. Nairn*, Vice-Chair, and Board Members *W. N. Fraser* and *B. L. Armstrong*.

**APPEARANCES:** *Dana Randall*, *Ian Thompson*, and *Joanne Lloyd* for the applicant; *Robert Budd* and *Maria Bertoni* for the respondent.

**DECISION OF THE BOARD;** April 7, 1992

1. By decision given orally and confirmed in writing on January 9, 1992 we directed the arbitration of the first collective agreement between these parties. We now provide our reasons for that direction.
2. The evidence and submissions of the parties were heard over six days of hearing. We do not intend to review all of the evidence but will review the chronology of events and summarize those matters relevant to our conclusion. Prior to commencing the hearing the parties agreed to waive the time limits in this matter.
3. At the outset of the hearing the respondent (the "employer" or the "Home") requested an adjournment in order that it could retain other counsel. The applicant (the "trade union" or "C.U.P.E.") opposed the request. Counsel appearing for the respondent had been its spokesperson in the negotiations for the first collective agreement and anticipated being in the position of both witness and counsel. The panel denied the request for the adjournment. While we were not entirely sanguine about the idea that counsel might also appear as a witness, we noted that the Board often conducts hearings in which a party is unrepresented and gives evidence and makes submissions on their own behalf. We were satisfied that the respondent had sufficient opportunity to retain and instruct other counsel if it had chosen to do so. Notice to the respondent ran from at least the date of the service of the application on the respondent. In addition, where counsel acts as a spokesperson in negotiations on behalf of a client they are, or should be aware, that they run the risk of putting themselves in the position of being a potential witness in a subsequent proceeding. The amount of notice must also be balanced against the expedited time frame set out in the legislation for the resolution of these disputes.
4. In the course of the hearing we were asked to make a ruling with respect to the admissibility of certain evidence. The applicant filed a section 91 [formerly section 89] complaint in August, 1991 alleging various matters. The respondent objected to any evidence being called concerning that complaint, in that the complaint had not been consolidated with the hearing of the application under section 41. We ruled that the evidence arising from the section 91 complaint was admissible. The applicant had identified and pleaded the section 91 complaint in support of its application under section 41. The evidence was relevant regarding the course of conduct engaged



in by the parties over their negotiations. Although in the circumstances the section 91 complaint itself was not before the panel there was no basis for excluding relevant evidence as it related to the section 41 application. On that basis we heard evidence concerning matters referred to in the section 91 complaint filed under Board File No. 1580-91-U.

5. The respondent is a social service agency funded by the Ministry of Community and Social Services (the "Ministry"). It offers residential and some non-residential programs primarily for male young offenders. On October 4, 1990 the applicant was granted an interim certificate as bargaining agent for all full-time employees of the respondent with the exception of office and clerical staff. The bargaining unit is comprised of those counsellors, child care workers, and others employed to provide the direct service to the client base. Notice to bargain was served on the respondent on October 25, 1990.

6. The first bargaining session was January 17, 1991. Between the date of sending the notice to bargain and this meeting the parties were having discussions on a variety of matters, including certain scheduling issues, implementation of the respondent's first lay-off (which included the position held by the local union president), and merit increases and the effect of the freeze provisions under the Act. The respondent retained counsel to represent it in these matters and in the negotiations for the first collective agreement. A section 91 complaint was filed in late 1990 which was subsequently resolved by the parties.

7. On January 17, 1991 the union tabled its proposals for a complete collective agreement. Discussions were briefly side-tracked by the presence of the local president who was no longer employed at the Home. It appears that the respondent expressed some concern that her presence might impede negotiations. While this issue was not pressed, the union representative did not respond favourably. The applicant reviewed its proposals. The parties set February 13 as their next negotiating session at which time the employer was to respond.

8. On February 13, 1991 the parties met. There were brief discussions concerning the then outstanding section 91 complaint. The respondent tabled its proposals. They also comprised a complete collective agreement and made no reference to the applicant's proposals. Having reviewed that document briefly it was apparent to the parties that they were some considerable distance apart. They could not agree on which document to work from. Ms. Lloyd, the union spokesperson, may have made reference to a collective agreement between C.U.P.E. and Clifton House, another social service agency (the "Clifton House agreement"). In any event, that document was not tabled and nothing more was accomplished. Following this negotiating session Ms. Lloyd went into hospital.

9. While Ms. Lloyd was on sick leave, negotiations did not continue. However the parties were engaged in dealing with each other on a number of other issues. The applicant had raised concerns about practices in the Home, had contacted the Ministry, and subsequently contacted the Home's Board of Directors concerning the state of collective bargaining. The applicant applied for conciliation in April 1991 notwithstanding the only real negotiations had been an exchange of proposals. On May 10, 1991 the parties met. The applicant tabled the Clifton House collective agreement. We have no doubt that at this stage of the negotiations there was considerable animosity between the parties. The respondent was angry about the manner in which the applicant was raising issues in the press, the nature of some of the applicant's proposals and wondered about the applicant's concern for the clientele. The applicant was of the view that the respondent was attempting to intimidate it by laying-off the union president and tabling proposals in negotiations which were less than the status quo enjoyed by the employees in the bargaining unit. The tabling of the Clifton House collective agreement however was recognition by the applicant that its original

proposals were, in Ms. Lloyd's own words, a "wish-list". It was her view that the Clifton House agreement, as an existing document, might better serve as a basis for attempting to find some common ground between the parties. The applicant was clearly also of the view that the respondent's original proposals represented a similar kind of employer "wish-list". The respondent maintained throughout negotiations and before the panel that its proposals could not be so characterized.

10. Little, if anything, was accomplished on May 10. The respondent advised the applicant that although it did not anticipate that the Clifton House agreement would serve any useful purpose, it was prepared to look at it. Ms. Lloyd did review some of the applicant's concerns with respect to the employer's proposals. As we noted, this meeting was characterized by considerable animosity.

11. Prior to their first meeting in conciliation, the respondent's representative, Mr. Budd, advised Ms. Lloyd that the Clifton House agreement was not acceptable. We note that while the respondent alleges in its reply that the union was not prepared in any way to recognize the employer's original document and that no attempt was made to break that proposal down into smaller segments and deal with individual articles in an attempt to resolve some of the issues, the same can be said with respect to the respondent's conduct in dealing with the trade union's original proposals and the subsequent tabling of the Clifton House agreement. The parties met in conciliation on June 5, 1991. The session was short and accomplished little, if anything. The applicant requested that a no-board report issue. It did, and the parties were in a legal strike or lock-out position as of July 4, 1991.

12. Attempts to meet in mediation prior to the strike date were unsuccessful. Ms. Lloyd forwarded a letter to Mr. Budd dated June 27, 1991 advising the respondent that the applicant was prepared to work from both the respondent's document and the Clifton House agreement. That agreement was again rejected by the respondent as "totally inadequate" in a letter dated July 2, 1991. As of July 3, 1991 Ms. Lloyd was again on sick leave. She was replaced as spokesperson in the negotiations by Mr. Ian Thompson. We found Mr. Thompson to be a straightforward and credible witness. He has both considerable training and experience in the social service field particularly in the area of juvenile offenders. He has engaged in collective bargaining from both the management and trade union sides. Mr. Thompson brought a fresh approach to the bargaining table, seeking to reduce the existing tensions between the parties and to effectively address the substantive issues between them. Mr. Budd testified that Mr. Thompson had accurately reflected the parties' positions and movement in negotiations on July 25.

13. A date for mediation was established for July 25, 1991. The parties met directly. In preparation for that meeting Mr. Thompson took the respondent's proposals and the trade union's original proposals and prepared what was referred to as the "cut and paste" document. He was extremely concerned that the parties were entering into mediation after the legal strike and lock-out date had passed with no item agreed to. He understood that the respondent found the Clifton House agreement to be unacceptable. He therefore worked from the respondent's document adopting as much of its language as he felt the applicant could, while amending other provisions using the trade union's original proposals. He also prepared and tabled a wage rate proposal. As we will review later, it subsequently became apparent that those proposed rates were less than what the employees would earn as of July 26, 1991. The panel carefully reviewed the document tabled by the applicant on July 25 and were satisfied that it represented a substantial adoption of the respondent's language and represented not only considerable movement by the applicant in the negotiations but a serious attempt to kickstart the process.

14. At the meeting on July 25, 1991 Mr. Thompson tabled and reviewed this document. No



notice had been provided to the respondent that the applicant's negotiating committee had changed. However at that time he reviewed the document clause by clause accepting much of the respondent's language and suggesting revisions to other language and expressing the applicant's concerns with respect to those issues. Having heard the applicant's position the respondent accepted and agreed to those matters that represented its own language. On other issues it either gave no response or re-tabled its original proposal or its proposal with some minor variation. These variations included an agreement to have three stewards instead of two, to include a clause that would require the respondent to submit the applicant's dues to its national office rather than "head office", and a willingness to accept the applicant's calculation of credit for seniority in certain circumstances. The respondent indicated it had some flexibility regarding time limits in certain of its proposals, for example, the grievance procedure and Article 10.04, but it made no counter-proposal. The respondent also indicated that in those proposals which represented "take-backs", the respondent was prepared to move to a two-tier system. Those issues primarily involved the length of the probationary period and vacation entitlement. The respondent maintained its position of eliminating the existing employee group RRSP plan. It was also of the view that it was premature to discuss monetary issues. The applicant then made a second pass in response. It accepted more of the respondent's language and made other suggested modifications. It also withdrew certain of its proposals and retained its position on other matters. At this point Mr. Budd, on behalf of the respondent, advised the applicant that there was no point in continuing the negotiations because in the respondent's view the applicant had not been prepared to make sufficient movement. Negotiations, contrary to the wishes of the applicant, ended at that point.

15. On July 25, in response to the applicant's concern that the respondent was proposing the elimination of the employee group RRSP, a substantial reduction in vacation entitlement, an increase in the probationary period from four to twelve months, and the elimination of existing family leave provisions, the employer proposed a two-tier system at least with respect to the probationary period and vacation entitlement. Mr. Budd testified that the respondent proposed this modification on the basis that it decided to assure existing employees of their current benefits but that new employees would receive less. This reduction for new employees was justified on the basis of the Home's financial position. Mr. Budd testified that the Home was in a deficit position although no reference to any deficit was made in the course of the negotiations. The respondent was of the view that the applicant was aware of the deficit due to the fact that two layoffs had been implemented in December, 1990 in response to financial concerns. Mr. Budd's statement in evidence was not supported by any evidence to indicate the Home's continuing position following the implementation of the layoffs. The longer probationary period was justified on the basis that the workplace was now a union environment where reinstatement of an employee was a possibility. The applicant opposed the implementation of any two-tier system on the basis that it appeared to penalize employees following unionization.

16. Following July 25, 1991 Mr. Thompson forwarded a letter to Mr. Budd dated July 29, 1991 indicating that the applicant was interested in resuming negotiations and advising that it felt able to make further movement in a variety of identified areas. Subsequently on August 6, 1991 Mr. Thompson wrote requesting a reply to his letter of July 29. On August 13, 1991 Mr. Budd responded by advising that he would be on vacation until September 9, 1991 and at that time he would be pleased to discuss the matter further. Subsequently, notwithstanding attempts by Mr. Thompson to reschedule dates for negotiation, no further response was forthcoming from the respondent. The parties met in an attempt to resolve the second and outstanding section 91 complaint on September 6, 1991. Mr. Thompson was aware that Mr. Budd was negotiating and available in connection with another matter involving the applicant. Unable to secure further negotiating dates, on September 17, 1991 the applicant staged a one-day walk out, notice of which was



provided to the Home approximately two days before. The applicant filed this application for a direction that the first collective agreement be settled by arbitration on September 24, 1992.

17. On July 19, 1991 Mr. Budd had forwarded a letter to Ms. Lloyd advising the applicant that the respondent was implementing a special salary adjustment as well as a six percent increase across the salary grid. These rates were to be effective as of July 26, 1991. It was apparent (both to the panel and to the respondent on July 25) that Mr. Thompson was not aware of this letter on July 25, nor did the respondent advise him of its existence or its content.

18. The funds for these increases came from the Ministry of Community and Social Services. The special salary adjustment was an amount stipulated to be paid directly to wage rates and represented a seven percent one-time only increase in wages. In addition, the Ministry had provided the respondent with an annual budgetary increase which represented a six percent increased allocation. This amount was discretionary in the sense that it was not required to be allocated specifically to wage rates, although historically it had been. Following the expiration of the freeze period on July 4, 1991 the respondent decided to implement the seven percent increase and to apply a further six percent increase to wage rates. In coming to this decision the respondent stated it took into account the outstanding issues in the negotiation.

19. The respondent sought to rely on the early conduct of the applicant to support its position that this application should be dismissed. While another party's conduct is relevant to the application it will not necessarily preclude a direction. In addition, if the preconditions in section 41 are met it does not matter whether the impugned conduct was advertant or inadvertent (see *Peacock Lumber Limited*, [1990] OLRB Rep. May 584 and the cases cited at paragraph 31 therein). Negotiations for a first collective agreement are qualitatively different in the face of section 41. While the provision does not supplant collective bargaining it clearly attempts to motivate parties toward negotiations based on efficient, substantive communication and no longer negotiations based solely on the exercise of bargaining power. The risk that a party runs by simply exercising overt power is the potential for concluding its first set of negotiations at interest arbitration rather than by negotiated settlement.

20. There is no doubt that the applicant's conduct of its negotiations contributed to some delay. Ms. Lloyd's initial and apparently heavy-handed attitude in response to the respondent's position was not well received by the respondent. Both parties were influenced by what they perceived as inappropriate, improper or reckless conduct on the part of the other. These included the circumstances leading up to the filing of two section 91 complaints, the filing by the applicant of a complaint with the Ministry concerning the care being provided by the Home and the public discussion of same in the media.

21. With respect to the early stage of negotiations the panel was without doubt that the respondent's proposals as a package constituted a "wish-list" (as were the trade union's proposals). As a package, the proposals represented serious intrusions on bargaining unit integrity, the availability of the grievance and arbitration procedures, seniority protections, and they left considerable discretionary authority to the respondent. Early posturing occurred on both sides of the bargaining table in this case and we were satisfied that to the extent that the trade union's wish-list had an adverse effect on the respondent, so too, the respondent's document had a similar effect on the trade union. The negotiations did not get off to a good start.

22. However, it was also apparent that as of July 25 both parties were ostensibly of one mind. Mr. Thompson was extremely concerned that the parties were in mediation, past the strike date, without a single issue being agreed to. He had never before found himself in this situation in negotiations. Similarly, Mr. Budd testified that he was looking for substantial progress in negotia-

tions on July 25, and expressed similar concerns that the parties were in a legal strike and lock-out position. This concern was enhanced for the respondent in that the applicant had given no indication if or when it would engage in strike activity. The respondent was obviously concerned with maintaining services to its clientele. As it happened, when the applicant did stage a one-day walk-out, notice was provided.

23. Notwithstanding the respondent's stated concern that the negotiations were at an advanced stage with little achieved, it was the respondent that brought negotiations to an end on July 25. This was justified on the basis that it "simply did not see enough movement to continue talks that day". The applicant came to that negotiating session having made substantial movement in the form of adopting much of the respondent's proposed language. The only move of any substance made by the respondent was to eliminate proposed Article 8.06(b)(vii) and to move from a position of concessions to a two-tier system.

24. Proposed Article 8.06(b)(vii) was a form of deemed termination provision. It provided that the conduct set out in that sub-paragraph would constitute just cause for immediate dismissal and further, that the penalty would not be subject to review under the grievance and arbitration procedures. Sub-paragraph (vii) identified as just cause for immediate dismissal "any other conduct which the Employer deems injurious in any regard to the Home, to one or more employees (whether or not covered by the terms of this Agreement) or one or more clients under Home care". While the applicant was opposing Article 8.06(b) in its entirety there is no doubt that this sub-paragraph was particularly offensive to it. It conceivably included such a broad range of conduct and such a degree of discretion to the employer so as to essentially eliminate any just cause protection and further removed the right to utilize the grievance and arbitration process for review of those decisions. The movement from concessions to a two-tier system was made in the context of the respondent deciding to implement a further six percent wage increase to current employees and with the knowledge that the trade union had proposed wage rates less than that, and in the face of the applicant's opposition to the implementation of a two-tier system.

25. Before the panel, the respondent relied on a collective agreement between the Children's Aid Society of the District of Parry Sound and OPSEU (the "Parry Sound agreement"). It was put forward by the respondent as representative of a norm in the social service industry, but the evidence does not warrant such a finding. In any event, that document was neither tabled during the negotiations by the respondent for the benefit of the applicant's review, nor does it reflect the proposals being maintained by the respondent on July 25. In fact the respondent acknowledged and characterized its position on July 25 as one of hard bargaining. It clearly sought to push the applicant to make further modifications. In response to these moves by the respondent, the applicant did make further amendments to its proposals and accepted more of the respondent's language and deleted some of its proposals. It was at that stage that the respondent called a halt to negotiations. The result was to put the applicant in precisely the position that the respondent expressly refused to be in, that is, having to bargain with itself.

26. We do not see this movement by the respondent as indicative of or confirming the respondent's stated intention to make substantial progress in the negotiations at that stage. Article 8.06 (b)(vii) is so ambiguous and extreme so as to virtually eliminate any protection provided by the just cause clause that the parties were prepared to agree to. It would be naive to conclude that deleting this sub-paragraph represented any real movement by the respondent. We will discuss the movement to a two-tier proposal in the context of the respondent's position on monetary issues.

27. The respondent attempted to lay the blame for the lack of progress in the negotiations at the feet of the applicant. It took the position that on July 25 Mr. Thompson was not prepared



and fully informed for the negotiation and pointed to two items. We have no doubt that Mr. Thompson would have corrected those matters upon being apprised of them. Further it is apparent that the respondent made mistakes as well, for example with respect to parental leave, which were corrected during the course of negotiation.

28. It was apparent to the panel that as of July 25 and subsequent to that time the respondent was influenced by its perception that the trade union could not mount any kind of economic sanction, and as a result concluded its position in bargaining was one of superior strength. It would appear that consciously or otherwise the respondent's approach to negotiations from July 25 onward contained a punitive element.

29. The conduct of the respondent subsequent to July 25 belies its stated intention to make substantial progress in the negotiations. Up to the time of the filing of the application the respondent, notwithstanding repeated attempts by the applicant, had not responded for the purpose of scheduling further negotiations. This was in the context of the letter from the applicant indicating that it was prepared to make further moves.

30. We were satisfied that as of the date of application the process of collective bargaining had been unsuccessful in the circumstances of this case. Notwithstanding that the parties had not engaged in extensive negotiations the process was well advanced being into mediation, their legal strike and lock-out date having passed. Little had been resolved. While certain matters were agreed to on July 25 those were circumstances where the applicant agreed to language proposed by the respondent. The respondent failed to make any real movement and then it called a halt to the negotiations. Then, for a period of two months, the respondent failed or refused to set further dates for negotiation. The respondent continued to take the position before the panel that the proposals it had tabled were reasonable, well within the norm, and that any failure to bargain was the responsibility of the trade union. Whereas the trade union had from at least May 10, 1991 acknowledged that its original proposals as a package constituted a "wish-list", the respondent made no such similar acknowledgement with respect to its proposals. Yet in evidence Mr. Budd confirmed that sentiment by acknowledging that many of the respondent's proposals represented an opening position and that there had simply been insufficient discussion concerning them. Yet the respondent offered no counter-proposals and provided no reasonable prospect for further discussion. Overall, we were satisfied that the process of collective bargaining had been unsuccessful between these parties. It remained to be determined whether that lack of success was as a result of one of the preconditions set out in section 41(2)(a)-(d) of the Act.

31. We were satisfied that the pre-condition in section 41(2)(c) had been met by virtue of the respondent's position on monetary issues. In negotiations, the respondent took the position that it preferred to deal with non-monetary issues first and monetary issues in terms of total compensation. Apart from wage rates other cost issues on the table included (not exhaustive) vacation entitlement, health and welfare benefits, holiday pay, certain leaves of absence and hours of work and overtime. Mr. Budd testified that "only a fool would negotiate (wage rates) in the absence of other monetary issues". Yet knowing that the parties had a number of monetary issues outstanding, the respondent chose to pass on a six percent increase in wage rates with absolutely no consultation or discussion with the trade union. Certainly on July 25, when it became apparent that the applicant's wage request was less than what the respondent had been prepared to pay, the folly of the respondent's actions was apparent. We simply cannot understand why the respondent chose not to contact the trade union to advise that it was in a position to discuss all the monetary issues in dispute. The fact that the parties were now outside the freeze period does not change the nature of the duty to bargain nor the preconditions in section 41. Remaining silent on July 25 with the knowledge of the then current rates and taking the position that it was premature to discuss mone-



tary issues amounted in our view to a violation of the respondent's duty to bargain in good faith under section 15 of the Act. While that was not the issue before us, we were satisfied that it represented a failure to make reasonable or expeditious efforts to conclude a collective agreement. (It may well be difficult to conceive of circumstances that violate section 15 which would not also meet the pre-conditions in section 41(2)(a) or (c)). While purporting to seek to deal with monetary issues as a package, the respondent implemented a decision to increase wage rates only, to both its and the applicant's potential detriment. We are hard pressed to find any explanation for this approach except one that seeks to undermine the credibility of the applicant in the eyes of the employees in the bargaining unit. This conclusion is substantiated by Mr. Budd's evidence that the respondent waited for some time to pass after the strike deadline noting that no strike activity had taken place, before deciding to implement the wage increase. It was apparent that the respondent was of the view (however determined) that the applicant could not mount any economic pressure against it.

32. In the context of the overall circumstances, particularly the respondent's action in ending negotiations on July 25, its position of silence with respect to the implementation of the wage increases and delaying discussion of monetary issues on July 25, and its failure to respond to the applicant for the purpose of establishing further negotiating sessions, we were left with no doubt that collective bargaining had been unsuccessful because of the respondent's failure to make reasonable or expeditious efforts to conclude a collective agreement in accordance with section 41(2)(c).

33. The applicant reviewed a number of proposals of the respondent which it claimed were uncompromising and taken without reasonable justification within the meaning of section 41(2)(b). We note that during the course of negotiations the respondent provided little, if any, justification for its proposals but responded essentially by indicating agreement or re-submitting its original language. We intend to review a number of these provisions. We note that although the respondent indicated at the hearing that it was flexible about a number of its proposals, that flexibility was not identified to the applicant during negotiations. The respondent tabled its proposals on February 13, 1991 and virtually all of them remained on the bargaining table without serious modification as of the date of application. The bargaining position of the respondent was uncompromising.

34. The interpretation of "without reasonable justification" in section 41(2)(b) was discussed in *Formula Plastics Inc.* [1987] OLRB Rep. May 702 as follows:

24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the section as a whole, and having regard to the Board's analysis in *Nepean Roof Truss, supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends

largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board's interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has revolved under section 15.

28. The variety and social authority of the competing interests involved, together with the complex dynamics of the collective bargaining process make this task a difficult one. It requires a delicate assessment of the many differing factors which may be operating in and upon a given labour relationship, an assessment which must be approached from a perspective closely attuned to the practices and climate of labour relations at any particular point in time. Indeed, it is fair to say that this is a provision which will require the Board to draw heavily on its own expertise in labour relations.

35. Proposed Article 5.01 is a management rights clause. Article 5.01(f) of that proposal provided:

It is expressly understood and agreed that a breach of any of the Employer's rules or of any of the provisions of this Agreement, shall be conclusively deemed to be sufficient cause for discipline or dismissal of an employee, provided that nothing herein shall prevent an employee who has successfully completed the probationary period from going through the grievance procedure to determine whether or not such breach actually took place;

The applicant understood this provision to limit the availability of the grievance and arbitration provisions. The respondent argued that the provision would not limit access to the grievance and arbitration protection in that it did not provide specific penalties and therefore section 45(9) of the Act (the jurisdiction of an arbitrator to modify penalty in appropriate circumstances) remained available. In the face of that intention and the applicant's concern regarding any potential limitation it would have been an easy matter for the respondent to propose to eliminate the words "to determine whether or not such breach actually took place". That would make it clear to any employee unaware of section 45(9) of the Act (and to the union and any board of arbitration) that the right to grieve was not limited solely to whether or not a breach of employer rules or provision of the agreement had taken place, but that there was some further discretion in the arbitrator to modify penalty in appropriate circumstances. We note this because the respondent justified its proposal on the basis that employees ought to be aware that breaches of rules or of the agreement would constitute cause for discipline or discharge. On that rationale there is no need for the latter phrasing.

36. Article 7 of the respondent's proposals provided a no strike or lock-out provision. Articles 7.01, 7.02, and 7.03 all prohibit strike activity or the authorization, encouragement, etc. of strike activity. The applicant objected to the broad nature of the definition given to strike activity in these proposals. The respondent proposed in each clause the words prohibiting "strike, sit-down, slow-down" or "*any work stoppage, picketing or collective activity which will interfere in any way with the Employer's operations*" (emphasis added). The applicant was particularly concerned about the underlined portion of the proposal. It queried both the nature of any collective activity



and in whose opinion did it constitute interference. The applicant provided the example of employees wearing buttons to work supporting various lobbying action. The respondent agreed that such activity might or might not be covered. The applicant was concerned that the clause was too broad and ambiguous, particularly in the context of proposed Article 7.06. Article 7.06 stipulated that any employee who engaged in any activity covered by the earlier sub-paragraphs may be subject to discharge or other penalty and that such disciplinary action could not be the subject of review under the grievance and arbitration provisions in the collective agreement. The respondent was of the view that Article 7.06 limited only the review of penalty and justified the lack of arbitral review on the basis of the nature of the agency. It provided no example or identified no particular interest that would distinguish it from other workplaces. Nor did the respondent address the broad definition of activity covered except to agree that it potentially covered a range of activity that would not fall within the usual definition of strike activity.

37. The respondent in Article 8.06(b) proposed a specific penalty clause for certain conduct. That penalty was immediate dismissal and the clause provided that the penalty would not be subject to review under the grievance and arbitration procedures in the agreement. The proposal set out seven separate actions constituting just cause for dismissal. During the negotiations the employer deleted the sub-paragraph (vii) as referred to in paragraph 23 of this decision. The union was opposed to the specific penalty clause generally but specifically gave examples where it felt it was ambiguous and inappropriate. Sub-paragraph (iii) provided immediate dismissal for falsification of employer records. Mr. Thompson testified that rules of charting are often inconsistent and there is considerable discretion in determining what may be characterized as an incident and subject to charting. He also felt it was relevant whether an action was deliberate or unintentional. These concerns went to sub-paragraph (iv) as well, which identified a breach of confidentiality as conduct subject to immediate dismissal. While the respondent agreed that there was considerable ambiguity in the interpretation of conduct it noted that that interpretation was still subject to the grievance and arbitration procedures. Once found however, that conduct was subject to dismissal. To the extent that the respondent relied on the Parry Sound agreement we note that the sub-paragraphs in that collective agreement are more limited than those proposed by the respondent.

38. The applicant was also of the view that even if certain conduct was found to be inappropriate it should not necessarily warrant immediate dismissal as opposed to some lesser form of penalty. Sub-paragraph (ii) provided for immediate dismissal for *inter alia*, the use of alcohol while on duty. The applicant gave an example where a current employee had been found to have had a beer with lunch while on working time and a warning letter had been issued. The applicant felt that this proposal was more onerous than current practice and eliminated useful flexibility. The respondent did not address that concern.

39. The respondent's proposed Article 10.04 is a provision whereby employees lose all service and seniority and are deemed terminated in certain identified circumstances. While the applicant was prepared to agree to some form of deemed termination provision it took issue with the particular circumstances proposed. Article 10.04(b) provided that an employee who had been laid-off for two calendar months would lose all service and seniority and be deemed terminated. On July 25 Mr. Thompson countered by amending two calendar months to twenty-four months. Subsequently Mr. Thompson further amended that proposal to eighteen months. Ms. Lloyd on behalf of the applicant had earlier proposed twelve months. This was not known to Mr. Thompson nor is it apparent that Mr. Budd identified that clearly to Mr. Thompson on July 25. On July 25 however, the respondent apparently concluded that it had no incentive to move off its position of two months in light of what it felt was an inappropriate position taken by the applicant. We accept Mr. Thompson's evidence that had he been aware at the time of the applicant's earlier position he would have corrected the proposal. Apart from Mr. Thompson's mistake, the respondent provided



no justification for proposing that employees who had been laid-off for two calendar months should automatically lose all service and seniority and be deemed terminated.

40. With respect to the remaining sub-paragraphs of Article 10.04 the respondent testified that it was flexible on its time frames and referred to the Parry Sound agreement. However it made no such movement during negotiations, notwithstanding that some of what the applicant was proposing on July 25 could be found in the Parry Sound agreement. For example, the applicant was proposing there be allowance for reasonable explanations for absences prior to a deemed termination taking effect. The respondent agreed that its proposed Article 10.04(c) would have the effect that, if an employee were absent on sick leave for a period of two calendar months they would lose all service and seniority and be deemed terminated. The respondent further acknowledged that under proposed Article 10.04(d) it would be possible for a person on two days sick leave to lose all service and seniority and be deemed terminated where that employee had not obtained written advanced approval for the absence from the employer. Article 10.04(e) was to the same effect but referenced four days cumulative absence over a period of nine months. It was apparent that the respondent did not intend these results and acknowledged that it was an opening position. However no alteration to the proposal was ever made. Proposed Article 10.04(g) provided that an employee would lose all service and seniority and be deemed terminated if they refused "to continue to work or return to work during an emergency or for reasons of security or safety as determined by the employer". The respondent indicated that these matters were separate, that is, an emergency was something separate from security or safety and that there was no intention on the part of the respondent to oust any jurisdiction or right of an employee under the *Occupational Health and Safety Act*. That legislation provides most employees with a right to refuse what they believe to be unsafe work, which refusal triggers a mechanism for dealing with the safety concern. Further, that legislation prohibits an employer from penalizing an employee in any way for exercising that right. The comparable provision in the Parry Sound agreement is Article 10.04(f) which provides that an employee shall lose all service and seniority and be deemed terminated if they refuse "to continue to work or return to work during an emergency as determined by the employer unless a reason acceptable to the employer is provided". Obviously, the breadth of conduct covered in Article 10.04 as a whole further and substantially reduces the opportunity to utilize the grievance and arbitration provisions of the collective agreement and section 45(9) of the Act. The respondent acknowledged that these were opening positions but argued that no useful negotiations occurred with respect to this provision. Yet the applicant countered twice to this proposal, receiving no response.

41. In Article 11.02 the respondent proposed that in determining lay-offs the factors of "skill, ability, experience, qualifications, education, suitability, competence, efficiency and continuity of care" were to be considered and where relatively equal seniority would then govern. The proposal went on to stipulate that a Board of Arbitration "shall not substitute its judgement for the judgement of the employer as to the relative equality of the factors". The applicant was primarily opposed to the decision as to employees' relative equality resting in the sole judgement of the employer and not being subject to arbitral review. It was also concerned about the subjective nature of many of the stated factors. The applicant indicated it was prepared to accept a relative ability clause provided it gave some recognition to seniority rights. The applicant's concern regarding greater recognition of seniority rights was enhanced by virtue of the fact that the respondent's position in Article 10.04(b) was that anyone who had been laid-off for a period of two months would lose all service, seniority and would be deemed terminated. The employer's justification for both the criteria and the requirement of employer discretion was that it wanted to retain the best people in circumstances of a lay-off and that it was necessary to rely on certain intangible qualities of assessment given the nature of the service.

42. In Article 12.04 (job posting provisions) essentially the same factors were proposed to assess candidates for vacancies within the bargaining unit. Similarly to Article 11.02, it provided that the assessment was in the sole judgement of the employer and not subject to arbitrable review. It also proposed that the employer "shall be the sole judge of the overall requirements for the position". The applicant indicated it could not agree to such a provision in that it allowed for too much subjectivity and the potential for manipulating job requirements. The applicant expressed the same concern regarding what it saw as a dilution of any seniority principle. It was prepared to accept a relative ability clause subject to arbitrable review. In Article 12.03 the respondent proposed that it not be prevented in filling vacancies from considering applicants from outside the bargaining unit. The applicant opposed this on the basis that it would undermine the integrity of the bargaining unit and the benefit of any seniority protection of persons within the bargaining unit. To the extent that any justification was provided for Article 12.03, the respondent indicated it was not unusual to want to consider part-time employees for full-time vacancies as well. However the provision is much broader than that and no such limitation was identified or discussed in negotiations. Taking Article 12 as a whole, there was no justification provided by the respondent for requiring a job posting provision which would allow it, in its sole discretion, to consider any person for any vacancy in the bargaining unit and assess that applicant on the basis of criteria determined solely by it in circumstances where none of those decisions would be subject to the grievance and arbitration provisions. It seriously undermines any seniority benefit arising from collective bargaining and effectively eliminates any opportunity on the part of the bargaining agent to protect its members from arbitrary or unfair employer treatment through the grievance and arbitration process.

43. That proposal, taken with the proposals in Articles 5.01(f), 7.01 - 7.06, 8.06(b), 10.04 and the restrictions on arbitral review in Articles 11.02 and 12.04 all point to a conclusion that the respondent was attempting to minimize if not eliminate the availability of the arbitration process with respect to penalties or outcomes assessed by the employer in an attempt to foreclose review of the employer's decisions. Limiting the scope of arbitral review seriously weakens or eliminates any protection afforded by a just cause clause. Both more standard grievance and arbitration collective agreement provisions and the protection provided by section 45(9) exist to provide employees with some protection against arbitrary decision-making on the part of an employer. The grievance and arbitration process is a fundamental benefit inherent in collective bargaining. That is evidenced by the mere fact that the Act mandates that there be included in every collective agreement a form of grievance and arbitration process to provide for the resolution of disputes by a neutral third party. While it is contemplated that parties' can contract out of section 45(9) there was no justification provided by this employer for such an extensive limit on the arbitral power to review both employer decision-making and penalty. The mere assertion by the respondent that it is different by virtue of the fact that it is a social service agency providing care to young offenders provides no justification. There is nothing in the evidence that would warrant such a departure for this workplace.

44. Proposed Articles 2 (see paragraphs 47-49 of this decision), 10.01, 10.04, 11.02, 12.03, 12.04, 13.01 and 13.06 all seek to limit the accumulation or recognition of seniority for employees in the bargaining unit. Under Article 12 the respondent wants to be able to consider any applicant for any vacancy and be able to make its assessment of their abilities in its sole discretion with no opportunity for arbitral review. The result is that any recognition of seniority exists only if the employer chooses to recognize it. The same can be said for proposed Article 11.02.

45. In *Formula Plastics Inc.*, *supra*, the Board commented on the nature of these protections within a collective bargaining regime:

31. Laskin, J. A. noted in *Regina v. Arthurs, Exp. Port Arthur Shipbuilding* (1967), 62 DLR (2d) 342, [1967] 2 O.R. 49, 67 CLLC ¶14,024 that the employment security provided by senior-

ity and discharge provisions in a collective agreement is essential to the distinction between the common law and a regime of collective bargaining:

...it is sometimes forgotten that collective bargaining and the collective agreement have given the individual worker security of continuing employment, depending by and large only on his seniority in relation to the employer's production needs (in terms of numbers of workers and their skills) and on his good behaviour which avoids giving just or proper grounds for discharge. What are generically called seniority and discharge clauses represent the employees' charter of employment security; and it is reinforced by removing from the employer, not his initiative in acting against an employee, but his previously unreviewable right to rid himself of employees, even if it cost money damages to do so.

32. The Board has commented on the importance of this kind of security in another context in *Swing Stage Limited*, [1983] OLRB Rep. Nov. 1920:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their termination reviewed at arbitration. (See Division V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P. *Reconcilable Differences*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

33. For these reasons, discharge has sometimes been referred to as "industrial capital punishment". As one labour commentator notes (Weiler, P. *Reconcilable Differences*), (1980) p.138);

At several points on earlier pages, I have touched on the reasons why the protection against unjust dismissal is perhaps the critical job interest provided by the collective agreement. Especially in the case of the long service employee, being fired as a result of an immediate *contretemps* with his employer can have a devastating impact on his life. Not only is it difficult for older workers to find another job of any kind, but it is just about impossible to replace the benefits and amenities that are associated with lengthy seniority. It is for precisely that reason that the arbitration process has developed a broad remedial authority which requires that employees be given credit for their earlier service records, that employers follow systems of progressive discipline, that they be sparing in the use of discharge instead of suspension (even for serious offences such as deliberate insubordination, a physical altercation with the foreman, or dishonesty). *That body of industrial jurisprudence which has civilized the use of management's ultimate authority over workers is at the heart of the case for collective bargaining.*

[emphasis added]

Whether or not these proposals, taken individually, could be said to have been taken without reasonable justification, there was no reasonable justification for the totality.

46. The respondent's proposal on July 25 to provide a two-tier system in those matters involving compensation (for example vacation entitlement) was also in our view taken without reasonable justification. The respondent was aware that the applicant felt that a two-tier system represented a penalty being imposed on employees hired after the introduction of collective bargaining in the workplace. Nor was the applicant prepared to accept a compensation package that treated employees differently solely on that basis while performing the same work. The respondent had the opportunity to address that concern on learning of the increase to its funding. It chose not to



and maintained its position with the sole justification that it was attempting to save money. That cannot stand as a reasonable justification in circumstances where it has unilaterally decided to increase wage rates.

47. Article 2.03 of the respondent's proposals provided that part-time employees who worked temporarily as full-time relief would not be covered under the terms of the collective agreement. The provision defines "temporarily" as a continuous period not exceeding twelve months, which period may be extended by agreement of the parties. The justification provided by the respondent for this proposal was to encourage part-time employees to fill-in for full-time vacancies. It commented that the *Employment Standards Act* now provides for nine months parental leave and therefore it felt twelve months reflected and included that example. The applicant objected to the proposal on the basis that it saw no reason that employees performing full-time work would not be covered by the collective agreement although the applicant was prepared to acknowledge for example, a three month limitation which would be consistent with the opportunity to participate in health and welfare benefits. The respondent did not address why employees performing full-time work should not be covered by the collective agreement. Nor did it suggest how or why part-time employees might be encouraged to fill temporary vacancies when they would not be covered by the collective agreement and receive none of its benefits. We note that the job posting proposals leave the determination of the existence of a vacancy within the bargaining unit to the sole discretion of the employer. This would appear to leave the creation of temporary work to the sole discretion of the employer as well.

48. Proposed Article 2.04 stipulated that:

It is agreed that persons engaged on a temporary basis, either directly or through an agent, to replace employees absent due to vacation, illness/disability, or any other absence during which the employer determines an outside replacement to be necessary, will not be covered under the terms of this Collective Agreement.

The applicant was prepared to agree to a modified version of this proposal that eliminated the reference to any other absence determined by the employer. The respondent maintained its position on this proposal. At the hearing the respondent justified its position by stating that in its view temporary employees were just that, temporary, and did not fall within the confines of the collective agreement. The bargaining unit is described as all employees working on a full-time basis (excluding office and clerical). We have no hesitation in concluding that this proposal seeks to amend the recognition clause and as such is an issue that could not be pressed to impasse in the negotiations. In the context of considering the application for a direction under section 41 the respondent has provided no justification for its position. It has merely commented that in its view temporary employees do not fall within the ambit of the collective agreement. Parties may very well seek to negotiate limits on the rights and benefits enjoyed by temporary employees. Amending the scope of the bargaining unit is a different issue. Proposed Articles 2.03 and 2.04 must be read together. There simply has been no justification provided for the differing treatment of one employee engaged full-time on a "temporary" basis for a period of up to one year from a "permanent" full-time employee performing the same work. The distinction between "persons engaged on a temporary basis" in Article 2.04 and "contract employees" referred to in Article 2.02 of the proposals is also not apparent. The respondent's proposed Article 2.02 would have contract employees covered by certain provisions of the collective agreement.

49. These proposals in Article 2 exist in a context where it is also proposed that it be in the employer's sole discretion to determine when a vacancy exists, how any available work is to be filled, and with whom. At their extreme, these proposals would allow an employer to fill vacancies with any applicant (including persons from outside the bargaining unit), describe them as tempo-

rary for up to one year, ignore the collective agreement and then repeat that process again to a point where no one would be covered by the terms of the collective agreement.

50. In our view, the respondent's position on monetary issues, its attempt to so limit the opportunity for arbitral review of employer decisions, the attempt to undermine the just cause protection and recognition of seniority, and its proposals in Article 2, represent an underlying refusal to recognize the bargaining authority of the trade union within the meaning of section 41(2)(a). Although dealing with section 41(2)(b) [formerly section 40a(2)(b)] the comments of the Board in *Root Chemical Company Inc.*, [1991] OLRB Rep. Nov 1320, at paragraph 13 apply equally in this case:

13... When considered in the context of the Company's other proposals (many of which seek to retain for management a largely unfettered discretion in respect of hiring, discharging, laying off, and recalling employees), the Company's position regarding Article 10.04(b) appears to us to reflect an inability or unwillingness on the part of the respondent to recognize that, as a result of the applicant's certification, it cannot reasonably expect to continue to operate its business in precisely the same manner as it has previously done, without regard for meaningful seniority rights and other elements of job security which have come to to be among the hallmarks of successful collective bargaining.

51. For all of those reasons, we directed the settlement of the first collective agreement by arbitration.

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**1499-90-R; 1500-90-R; 1512-90-R; 1746-90-U; 1747-90-U** International Union of Operating Engineers, Local 793, Applicant v. **Camaro Enterprises Limited** c.o.b. as Muldar Construction and c.o.b. as Park Trucking, Respondent v. Group of Employees, Objectors; International Union of Operating Engineers, Local 793, Applicant v. **Camaro Enterprises Limited**, Respondent v. Group of Employees, Objectors; International Union of Operating Engineers, Local 793, Complainant v. **Camaro Enterprises Limited** c.o.b. as Muldar Construction and!d7or Park Trucking, Walter Ambrozik, Erwin Mowatski, Anne Mowatski, Respondents

**Certification - Construction Industry - Employee - Evidence - Practice and Procedure - Board satisfied that certain documents properly admitted as exhibits by Officer conducting examination in the exercise of his discretion - E. & E. Seegmiller case explained - Onus of proof regarding employee list issues lying with party seeking to exclude the person whose status is in question, except where it would have to prove a negative in order to succeed**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

**APPEARANCES:** *Jack J. Slaughter* and *Ed Kaplanis* for the applicant/complaint; *William S. Gardner* and *Barry Mulder* for Camaro Enterprises Limited; no one appearing for the Group of Employees, Objectors.

**DECISION OF THE BOARD;** April 30, 1992

1. The applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
2. Board File Nos. 1499-90-R, 1500-90-R and 1512-90-R are applications for certification within the meaning of section 121 (formerly section 119) of the Act.
3. Having regard to the agreement and joint request of the applicant and respondent in all three applications (and there being no indication that the Group of Employees, Objectors take a contrary position), the three applications for certification are hereby consolidated.
4. The name of the respondent in the consolidated application for certification is amended to "Camaro Enterprises Limited".
5. The applicant and respondent have also agreed on how the bargaining unit in the consolidated application for certification should be described (and again there is no indication that the Group of Employees, Objectors take any contrary position). Having regard to that agreement, the Board finds that all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing the same, and those employees of the respondent engaged as surveyors, construction labourers and truck drivers, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
6. Accordingly, this application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in what is now section 119(e) of the Act and, because the applicant is an affiliated bargaining agent of designated employee bargaining agency, this application has been brought pursuant to what is now section 146(3) of the Act.
7. The list of employees filed with respect to the consolidated application for certification contains 92 names. Initially, the applicant took the position that 21 names should be deleted from that list and that another 13 names should be added. Eventually, the applicant's challenges to the list of employees were reduced to 18 as follows:
  - (a) that L. Miller, D. Boulanger, E. Côté, D. Slavuta and D. Oneschuk should have their names deleted because they exercised managerial functions within the meaning of section 1(3)(b) of the Act;
  - (b) that W. Peniuk's name should be deleted because he exercised managerial functions or, in the alternative, because he was not an employee of the respondent on the date of application;
  - (c) that the names C. Rivard, K. Grant and D. Burnard should be added;
  - (d) that R. Halroyd's should be deleted because he was a night watchman and not a construction employee on the date of application;
  - (e) that M. Dubek's name should be deleted because, as a cook, she was not employed in the construction industry;
  - (f) that the names of F. Borg, R. Dreger, R. Lischynski, E. Parkinson, J. Reis, M. Brown and K. Thompson should be deleted because they



were either not at work on the date of application or were not construction employees, or were not employees of the respondent.

8. In the course of the hearing convened to hear the representations of the parties with respect to the Officer's report to the Board with respect to the employee list issue (at which hearing the Group of Employees, Objectors did not participate), the parties present agreed that Karen Hamilton (who no party had previously challenged) and M. Dubek should not be included on the list of employees for purposes of this proceeding. Their names should therefore be deleted from the list of employees.

9. In the course of their arguments, the parties present made submissions with respect to the admissibility of certain documents accepted as Exhibits by the Officer at the inquiry he conducted. In effect, the applicant sought to have the Board sit in review of the Officer's decision in that respect.

10. The documents in question consist of certain of "foreman's reports", "employee timesheets", "payroll printouts" and two Park Transport Ltd. documents, none of which were signed or prepared by anyone who testified before the Officer. The applicant argued that these documents are not the "best evidence" available and should therefore not be admitted by the Board, or, in the alternative, that no weight should be given to them. The respondent submitted that the documents in question are admissible as business records. Counsel argued that statutes like the *Ontario Evidence Act* codify the common law rule which was developed to allow documents prepared in the ordinary course of business to be admitted into evidence without the need to call the maker of those documents to testify. Counsel submitted that any concerns with respect to such documents, either individually or as a group, would at most effect the weight given to them.

11. We find it neither necessary nor appropriate to embark upon a lengthy dissertation with respect to the law of evidence in this area. Suffice to say that, as a technical matter, a document must generally be proved to be genuine before it is admissible into evidence. If required, such evidence may be direct or, in some circumstances, indirect. Sometimes, evidence is not required and a document is presumed to be genuine in the absence of evidence to the contrary. Whatever its genesis, the best evidence rule now means little more than that, if available, the original of any document offered as proof of its contents must be produced. Indeed, in modern terms, the best evidence of a document is referred to as "primary" evidence and is the original document itself. Other evidence concerning the contents of a document is called "secondary" evidence.

12. Business records; that is, documents made in the usual and ordinary course of business where it is in the usual and ordinary course of business to make such documents are admissible, both at common law and under the *Ontario Evidence Act*, to prove an act, transaction, occurrence or event recorded reasonably contemporaneously with the act, transaction, occurrence or event so recorded.

13. With respect to the documents in issue herein, the applicant does not object to the fact that they are not originals. The applicant does not assert that they are not true copies of the originals. The applicant does not rely on the apparent failure of the respondent to provide the advance notice and production of the documents required by the *Ontario Evidence Act*. Nor does the applicant suggest that the documents were not made either contemporaneously or in usual and ordinary course of business. Further, the documents purport to record objective fact which did not require interpretation by their maker.

14. We are satisfied that the documents in question were properly admitted by the Officer in the exercise of his discretion to do so, and that there is no reason to alter that ruling in any way.

The fact that the maker of some of the documents does not appear to have had direct knowledge of the matters recorded, and the secondary evidence relating to the interpretation to be given to any of the documents may affect the weight to be given to them but not their admissibility. Consequently, the applicant's motion for a ruling that the documents referred to in paragraph 10, above, are inadmissible is dismissed.

15. Further, there is nothing before the Board which suggests that the documents objected to by the applicant are inaccurate insofar as they record who was at work on what day. In our view, the minor errors or discrepancies pointed to by the applicant do not affect their reliability in that respect.

16. Both parties present also addressed extensive argument with respect to where the onus of proof lies with respect to the employee list issue(s) herein. The applicant submitted that the onus is on the respondent and referred the Board to earlier decisions in *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789, *Ro-Von Construction Limited*, [1988] OLRB Rep. Dec. 1329 and *Vanson Construction Limited*, (Board File No. 2953-89-R, October 24, 1990, unreported) which the applicant argued the Board should follow in preference to *E. & E. Seegmiller Limited*, [1991] OLRB Rep. Oct. 1124. The respondent acknowledged the utility of the Board's observations in *PHI International Inc.*, *supra*, but favoured the *E & E Seegmiller Limited*, *supra*, approach.

17. In *E. & E. Seegmiller Limited*, *supra*, the Board referred to *PHI International Inc.*, *supra*, and commented as follows:

14. At paragraph 21 of *PHI International Inc.* [1980] OLRB Rep. Dec. 1789, the Board explained that:

21. On an application for certification, the Board is required to ascertain both the number of employees in the bargaining unit employed on the application date, and the number of employees who were members of the union on the "terminal date" fixed pursuant to section 92(2)(j) of the Act. An employer is required to file, in Form 51, a list of his employees. This list must be prepared under the instruction of a responsible company official who signs the list to verify its accuracy. In determining the number of employees in the bargaining unit the Board places primary reliance on this material, for the number and nature of an employer's employment relationships are matters which are often within its exclusive knowledge. The trade union seldom has detailed information in this regard, even though its right to certification will ultimately turn on establishing majority support among these employees. This is especially so in the construction industry where employment relationships are transitory, employment levels can fluctuate on a day-to-day basis, and an employer may be engaged on a number independent and geographically separate construction sites. Unless there is an interchange of employees, or functional interdependence among construction sites, the union may not have specific knowledge of the employer's employee complement. In these circumstances, we do not think it is unreasonable to require an employer to come forward an [sic] substantiate its claim that certain individuals were, indeed, "employees" on the application date. Frequently, a simple check of the employer's records will be all that is required. Sometimes, it may be necessary to entertain oral evidence. In either, case, however, we are satisfied that when an employer submits a list of individuals whom it

claims are employees in the bargaining unit on the application date, it must be prepared to come forward, if challenged, and demonstrate that its list is accurate.

On the other hand, it has been said that the onus with respect to “list issues” lies with the party seeking to exclude a person from the list of employees in a bargaining unit.

15. There is merit to both views. On one hand, it is the employer which originally places persons on a list of employees and is in the best position to justify its decision to include or exclude a person from it. On the other hand, a trade union which asserts that a person should be off or on a list of employees should be able to provide some basis or justification for adopting its position in that respect.

16. In our view, however, questions such as this are best decided by answering the following question: “Is it more probable than not, on the evidence, that the person in dispute was an employee in the bargaining unit during the times the material to the Board’s considerations?”. Fashioning an answer to this question may well involve various onuses, but the answer will ultimately depend upon an assessment of the evidence before the Board.

18. In *E. & E. Seegmiller Limited*, *supra*, the Board did not intend to suggest that a respondent employer bears no onus with respect to a list issue. The Board merely observed that it is overly simplistic to say that the respondent bears the only onus. Indeed, the decisions in *Ro-Von Construction Limited*, *supra*, and *Vanson Construction Limited*, *supra*, while adopting *PHI International Inc.*, *supra*, point out that the onus of establishing that a person is excluded from the operation of the Act has long been on the party making that assertion. And, as both parties observed in argument, in the absence of good reasons, onus should not be placed so as to put a party in the position of having to prove a negative.

19. Consequently, with respect to the employee list issues herein, it seems to us that the onus of proof lies with the party which seeks to exclude the person whose status is in issue, except where it would have to prove a negative in order to succeed, and in which case the onus lies with the other party. Accordingly, the applicant bears the onus with respect to Miller, Boulanger, Côté, Slavuta, Oneschuk, Peniuk (with respect to the section 1(3)(b) issue), Rivard, Grant, Burnard, and Halroyd. The respondent bears the onus with respect to the Dreger, Lischynski, Parkinson, Reis, Brown, Thompson, and Peniuk (with respect to whether he was an employee of the respondent on the date of application).

20. We turn first to the persons whose presence on the list of employees is challenged by the applicant on the basis that they exercise managerial functions. Section 1(3)(b) of the Act provides that (subject to section 92, which does not apply herein) no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions. Consequently, for purposes of an application for certification, the Board excludes from the bargaining unit all persons employed at and above the lowest level of management. In applications which relate to the construction industry, working foremen are generally included in the bargaining unit unless they have some real overall responsibility for a construction site or project, or can and do effect the employment status of persons who are employees in the bargaining unit.

21. With respect to the applicant’s “managerial” challenges, the Board finds, on the evidence before it, that D. Boulanger, W. Peniuk and D. Oneschuk exercise managerial functions



within the meaning of section 1(3)(b) of the Act and must therefore be deemed to not be employees for purposes of the Act in this application. The Board finds that L. Miller, E. Côté and D. Slavuta do not exercise managerial functions and are properly included on the list of employees for this application.

22. D. Boulanger was the respondent's "road foreman" at all material times. He spent most of his time directing the respondent's asphalt operations and the 10 - 11 employees engaged in it at Dinorwic. There is no evidence that he did any significant hands-on work. He seemed to exercise significant independent managerial authority in that respect. For example, he decided, in conjunction with a representative of the Ministry of Transportation, whether or not to pave, and he had authority to move employees around and even send them home (even though his authority in that respect appears to be somewhat less than when he is working in Manitoba).

23. W. Peniuk was in charge of a crew of 6 - 10 employees working on frost heaves, replacing culverts and general work. Although he did spend some time working with his crew, it appears that his estimate that this sometimes took up as much as 50 per cent of his time was a rather generous one and that what work he did in that respect generally consisted of helping out when necessary. The evidence does not suggest that he spent any significant amount of time "pitching in" on the date of application. It is noteworthy that, although he never exercised this power in Ontario, he felt he could send an employee home on his own authority. There is nothing in the evidence to suggest he could not. Finally, Peniuk was paid a salary which did not vary according to the number of hours he worked. Although, his case was close to the line, the Board was satisfied that, on balance, he should be considered to be managerial and therefore excluded from the list of employees. It is therefore unnecessary to determine whether Peniuk was employed by the respondent on the date of application (although it appears he was).

24. D. Oneschuk did not testify before the Officer. Nor did the respondent's job site superintendent, Walter Ambrozik (although the latter was available and even present during the Officer's inquiry). The only real evidence of substance with respect to Oneschuk comes from three bargaining unit employees. These employees clearly perceived Oneschuk to be managerial and their descriptions of the way he conducted himself suggest that this perception was accurate. Their evidence also suggests that although he occasionally operated a machine, he did not do so often and indeed that he was unable to do much hands-on work because of a heart ailment. Barry Mulder, a principal of the respondent, testified that Oneschuk was physically able and expected to be a working foreman. However, his opinion was not based on any direct knowledge or information and we are unable to give his uncorroborated conjecture any weight. We are therefore satisfied that Oneschuk exercises managerial functions and should therefore not be included on the list of employees.

25. L. Miller worked with a crew of three other employees. He was generally actively employed as a truck driver although on the date of application he spent the majority of his day operating a shoulder spreader. The evidence does not suggest that Miller could affect the employment of any employees of the respondent or that he had any other significant managerial responsibilities. D. Slavuta operated an asphalt plant as part of the asphalt crew supervised and directed by Boulanger. Although he did give some directions to the two to three labourers assigned to the asphalt plant with him, it is evident that he worked with them. It is not apparent that Slavuta had any real managerial responsibility with respect to either the asphalt plant or the employees he worked with. It was Boulanger who did. E. Côté worked on a crew of approximately six. This crew was engaged in installing guard rails and doing general cleanup work. What sparse evidence there is suggests that he worked directly with his crew and had even less responsibility for it than Slavuta had for the asphalt plant.

26. In the result, the Board is not satisfied that Miller, Slavuta or Côté exercised managerial functions within the meaning of section 1(3)(b) of the Act. To the extent that they were foremen at all, they were working foreman without significant managerial responsibility. As such, they should be included on the list of employees.

27. Ed Kaplanis, the applicant's Provincial General Organizer and its lead organizer for this application, testified before the Officer that he saw C. Rivard, K. Grant and D. Burnard working on the date of application as a labourer, truck driver and flagger respectively. However, his evidence in that respect is based on what appears to be a rather cursory drive through the job site on the date of application. In addition, his testimony suggests that he could have confused either the identities of the various persons he testified with respect to or even the dates he saw them working. On the other hand, we have already noted that there is nothing to suggest that the respondent's records are inaccurate to the extent that they record when various persons were at work. Accordingly, where there is a conflict between the testimony given by Kaplanis and the respondent's records, we respectfully accept the latter as being the most reliable. We therefore find that none of C. Rivard, K. Grant or D. Burnard were at work for the respondent on the date of application herein. They should therefore not be included on the list of employees for this application.

28. For the same reasons, F. Borg, R. Dreger, R. Lischynski, J. Reis, M. Brown and K. Thompson should be included on the list of employees. The respondent's records show that all of these persons were at work for the respondent in the construction industry on the date of application. Again, there is nothing in the evidence that would suggest that the respondent's records are unreliable in that respect. Further, the evidence of Kaplanis, which is the only evidence led by the applicant in that respect, goes no further than indicating that he had never heard of or didn't recall seeing these individuals. Taken as a whole, the evidence of Kaplanis does not inspire confidence in its reliability in that respect.

29. The status of D. Parkinson can also be determined on the basis of the respondent's records. His name appears on two documents connecting him to Park Transport Ltd. This company appears to be in the same corporate family as the respondent, but it is clearly a separate corporate entity (and there is no section 1(4) application before the Board in that respect). On the other hand, the employee timesheet record submitted with respect to Parkinson is a generic document which does nothing to connect him with the respondent for employment purposes and, significantly in our view, his name does not appear on any of the foreman's daily report records filed. Consequently, the Board is not satisfied that Parkinson was an employee of the respondent on the date of application and his name should not be included on the list of employees.

30. R. Halroyd was employed by the respondent to provide overnight security for the asphalt plant operated by Slavuta under the supervision of Boulanger. Slavuta, who was in the best position to know, testified that Halroyd's duties and responsibilities were primarily those of a night watchman. Although he did some minor maintenance, the evidence suggests that this was not a significant part of Halroyd's job. The evidence also indicates that Halroyd occasionally helped unload oil delivered to the asphalt plant after regular working hours, but it does not appear that this happened often or that he did any unloading at all on the date of application. Halroyd was clearly a night watchman. As such, he is not properly included on the list of employees in the bargaining unit.

31. In summary then, K. Hamilton, M. Dubek, D. Boulanger, W. Peniuk, D. Oneschuk, C. Rivard, K. Grant, D. Burnard, E. Parkinson and R. Halroyd should be *excluded* from the list of employees. L. Miller, D. Slavuta, E. Côté, F. Borg, R. Dreger, R. Lischynski, J. Reis, M. Brown and K. Thompson should be *included* on the list of employees.

32. It is also apparent, from a review of the material before the Board, that the name shown as number 13 on page 2 of the list of employees should be Keith "McEwan", not Keith "McEnan".

33. In the result, having regard to all of the material before the Board, we find that there were 85 employees in the bargaining on the date of application herein.

34. The applicant has filed 70 pieces of documentary evidence of membership in the form of combination application and attached receipt cards. Each bears the name and original signature of the individual to whom it relates, and the receipts, each of which has been countersigned by a witness (the collector), indicate that a payment of \$1.00 has been made with respect to membership in the applicant within the six month period immediately preceding the terminal date herein by each person with respect to whom a card has been filed. The cards and money were collected by more than one person.

35. The applicant also filed three Form 80, Declaration Concerning Membership Documents, Construction Industry documents, one in each of three applications which have been consolidated into one as aforesaid. These attest to the regularity and sufficiency of the membership evidence.

36. Forty-seven of the applicant's membership documents relate to a person on the list of employees in the bargaining unit as found by the Board.

37. Accordingly, more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 20th, 1990, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

38. However, three statements of desire, or petitions, have also been filed in opposition to the application. These contain a total of 67 signatures, 21 of which appear to be of employees in the bargaining unit with respect to who membership evidence has been submitted by the applicant. Consequently, if proved voluntary, the petitions might raise sufficient doubt with respect to the support for the application among bargaining unit employees at the material times to cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken notwithstanding the level of support manifested by the applicant's membership evidence. Accordingly, the Registrar is directed to schedule all of these matters for hearing for the purpose of hearing the evidence and representations of the parties with respect to the voluntariness of the petitions, any other matters left outstanding in the consolidated application for certification, and the two section 89 complaints.

39. This panel is not seized.

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**3256-91-G; 3540-91-G** International Union of Operating Engineers and its Local 793, Applicant v. **E. S. Fox Limited**, Respondent; Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007, Applicant v. **E. S. Fox Limited**, Respondent

**Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Whether Board having jurisdiction to hear grievances not dealing exclusively with work performed in the construction industry - Whether the UA should be permitted to intervene in grievance referral where it has not filed, and has expressed no intention to file, a jurisdictional dispute complaint - Board adopting reasons in *Babcock and Wilcox* case and assuming jurisdiction - Board determining that UA has no legal right to participate in proceedings and should not be given intervener status**

**BEFORE:** *Jules Bloch*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

**APPEARANCES:** *Bernard Fishbein*, *Joseph Kennedy* and *James Anderson* for the applicant, International Union of Operating Engineers and its Local 793; *David Watson* and *Ron Coltart* for the applicant, Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007; *W. J. McNaughton* and *M. Whittaker* for the respondent; *A. J. Ahee* and *Ed Nicholas* on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 666 seeking intervener status.

**DECISION OF THE BOARD;** April 9, 1992

1. The Board orders that Board File No. 3540-91-G and Board File No. 3256-91-G be heard at the same time. Both cases involve a referral of a grievance pursuant to section 126 (formerly section 124) of the *Labour Relations Act*. The applicant Millwright District Council of Ontario (Millwrights) in Board File No. 3540-91-G and the applicant International Union of Operating Engineers and its Local 793 (Operators) in Board File No. 3256-91-G individually grieve that the respondent (E.S. Fox) has failed to abide by their respective province-wide collective agreements by failing to employ members of their respective unions. E.S. Fox replied that their Marine Division was performing work on a cargo vessel, owned by St. Mary's Cement. The Marine Division of E.S. Fox was performing this work pursuant to collective agreements with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 666 (U.A.) and the International Brotherhood of Electrical Workers, Local 303 (IBEW). The IBEW, sent correspondence to the Board, expressing its desire not to participate in the grievances. The U.A. attended at the hearing and submitted that it should be given intervener status in both grievances.

The parties asked the Board, prior to dealing with the merits of the grievances, to rule on two preliminary matters:

- 1) Does the Board, pursuant to its section 126 power have the jurisdiction to hear grievances which, do not deal exclusively with work performed in the construction industry?
- 2) Should the U.A. be allowed to intervene, in a grievance pursuant to section 126, in a situation where it has not filed, and has not expressed an intention to file a Jurisdictional Dispute?

2. With respect to the first preliminary matter, Counsel for the respondent asked the Panel to reverse previous Board jurisprudence wherein the Board has found that section 126 encompasses any grievance arising out of any collective agreement between a construction industry trade union and a construction industry employer. Counsel for the respondent submits that in this case E.S. Fox is acting through its marine division, that refitting a vessel in “wet dock” is not construction, and consequently a construction employer doing work outside the construction industry should not be subject to the construction sections of the *Act*, when engaged in non-construction activities. The Board should reverse its course down the slippery slope of *Babcock and Wilcox Canada Ltd.* [1987] OLRB Rep. Aug. 1053; *Babcock and Wilcox Canada Ltd.* [1988] OLRB Rep. Dec. 1198; *Ideal Railings Limited* [1990] OLRB Rep. Dec. 1283.

3. Counsel for the Operators argued that the Board must seize jurisdiction and then look at the collective agreements between the parties to see if the agreements cover the work in question. The Board should continue the “Babcock and Wilcox” line of cases because it makes good industrial relations sense. Counsel for the Millwrights agreed with counsel for the Operators. Counsel for the U.A took no position on this portion of the case.

4. This panel adopts the reasons for the “Babcock and Wilcox” line of cases. The policy reasons for this line of cases was summed up by another panel in *Babcock and Wilcox* [1988] supra at paragraphs 6, 7 and 8:

6. In our view, the interpretation of section 124 suggested by the earlier panel is the correct one. It also makes the most “industrial relations sense”. It is often very difficult to distinguish “repair” which is specifically mentioned in the definition of construction industry (see section 1(1)(f) and “maintenance” which is not - although the practice in the construction industry is to accord them separate legal treatment even when the employees or required skills may be the same. Indeed, one set of functions will often be done in close cooperation or conjunction with the other, by the same tradesman, employing the same craft skills, tools and equipment. It would make for much mischief and procedural uncertainty if a simple problem such as the non-payment of overtime had to be settled in two different forums at once, with the potential for conflicting interpretations of the collective agreement or contradictory notions about what is construction work and what is not. Furthermore, since the Ontario Labour Relations Board is responsible for interpreting and applying the special statutory framework applicable to the construction industry and, at the same time, is the designated arbitrator for collective agreements in that industry, it is both sensible and hardly surprising that section 124 is drafted broadly enough to encompass any grievance arising out of any collective agreement between a construction industry trade union and a construction industry employer. And it is the Board which has the exclusive jurisdiction to interpret and apply the complex statutory provisions which generally underlie construction industry collective agreements.

7. Does this literal application of section 124 to employers or trade unions which meet the literal terms of section 117 “open the floodgates” to claims that could not reasonably have been within the contemplation of the Legislature? Does it lead to anomalous results? We do not think so. Since unions which meet the test of section 117(f) are almost invariably craft unions confined to their historic craft units, it is most unlikely that they will have collective agreements entirely unrelated to their construction industry base. For example, it is unlikely that the Boilermakers’ Union would find itself representing the clerical employees of a construction industry employer. But even if it did, what would be the result: access to an arbitration process which is far faster and cheaper than that contemplated by most “industrial” collective agreements, with the added advantage of a Board-appointed Labour Relations Officer to assist the parties to resolve their differences without recourse to litigation. Thus, the interpretation suggested by the earlier panel of the Board is not only attractive from the perspective of labour relations policy, but also provides aggrieved parties (employers or trade unions) with an expeditious and relatively inexpensive method for resolving their disputes. When weighed against the respondent’s suggestion of bifurcated proceedings and potentially competing forums, we prefer an interpretation which makes section 124 available to any union or employer that meets the section 117 requirements -

whether or not the work in question, or some of it, is properly regarded as “construction work”. (See, generally, *Carroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282.)

8. We should make it clear, however, that in concluding that section 124 is broadly available to construction industry employers and unions, we do not decide whether any particular work falls within the ambit of those collective agreements, nor whether such agreements are confined solely to construction work. That is a matter of interpretation of the agreement itself, and lies at the heart of the matter currently before us.

The Board finds that it has jurisdiction pursuant to section 126 of the *Labour Relations Act* to hear the grievance.

5. With respect to the other preliminary matter, Counsel for the U.A. submitted that the Marine agreement between the U.A. and E.S. Fox is an agreement of longstanding. It is a valid collective agreement. This grievance should be treated like a sector dispute. Since there is no provision under the *Labour Relations Act* for a sector dispute involving construction and non-construction work, the U.A. should be granted intervener status in both grievances.

6. Counsel for the Operators relied on the legal maxim “Strangers to a collective agreement have no status to intervene in a private dispute between parties who have a collective bargaining relationship” In support of this maxim, counsel referred us to four cases. *Napev Construction Limited and Vepan Leaseholds Limited* [1976] OLRB Rep. March 109; *Napev Construction Limited* [1979] OLRB Rep. Sept 886; *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. April 574; *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908. Further he asserted that the *Labour Relations Act* itself provides for a mechanism to deal with a multi-party situation dealing with work assignments. If this is a case involving a dispute about work assignment then the parties could consent to adjourn the proceedings while the U.A. filed a jurisdictional dispute. Since the U.A. has not indicated that it intends to file a jurisdictional dispute, they can not be said to have a legal interest in these proceedings and therefore should not be granted intervener status. Further, there is no issue about proper notice because in law, a party that has no “lis” is not entitled to notice. Counsel for the Millwrights agreed with the position of Counsel for the Operators.

7. Counsel for E.S. Fox argued that insufficient notice was given to the parties. Second, the cases referred to by Counsel for the Operators could be distinguished in that in this case the issue involves a determination about the nature of the work and consequently which collective agreement should apply (i.e. a construction collective agreement or a Marine Collective Agreement).

8. The Parties did not make reference to *Re Canadian Union of Public Employees and Canadian Broadcasting Corp. et al; National Association of Broadcast & Electronic Technicians, Intervener* (1990) 70 DLR (4th) 175 a Court of Appeal decision which involved a Judicial Review of a private arbitration referred pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2, s.65(1). Two grievances were filed pursuant to two different collective agreements with the same employer concerning the same work assignment. The grievances were adjudicated upon by different arbitration panels. Each panel came to a different result about the work assignment. The employer relied on the decision which affirmed its work assignment. The Divisional Court found that the legal rights of the Unions and their members were not affected by the earlier award and that a failure to give notice to persons who were only “consequentially” affected by the award did not constitute a denial of natural justice.

9. The Court of Appeal overturned the decision of the Divisional Court. The heart of the Court’s decision can be found in this paragraph at page 177:



My thinking starts with a practical, common-sense compulsion to put all these parties in one room, before one tribunal, to obtain one ruling on their differences. Upon analysis I find that legal precedent supports this view.

The Court continued by saying, at page 179:

I only observe that there is no clear legislative path to resolution of these overlapping disputes though practicality in day-to-day labour relations demands that there be one.

10. In Ontario, pursuant to section 93 (formerly section 91) of the *Labour Relations Act*, parties who wish to dispute work assignments which are ostensibly covered in overlapping collective agreements, can apply to the Board for a determination of the issues. In these types of proceedings all parties, claiming the work, are entitled to be involved in the hearing. These provisions in the Ontario *Act* distinguish the case before the Board from the Court of Appeal decision.

11. *Napev 2 supra*, involved a complaint under section 112(a), now section 126. The applicants alleged that work which was theirs under their collective agreement had been assigned to another union. That union sought to be made an intervener to the applicants section 112(a) complaint. The Board found at page 888 that:

...the fact that a jurisdictional dispute has been alleged by the interveners does not, in our view, open the way for them to participate in a hearing on the merits of the grievance in that they still remain strangers to the alleged collective agreement. Although they may be incidentally or commercially affected by a determination as to the merits of the grievance that is not a sufficient basis to accord them status.

This rationale also applies to the case before us. On its face the grievances before us are the type that usually give rise to jurisdictional disputes. Consequently, for the U.A. to be given status in this case, a jurisdictional dispute must be filed. This is not a case where the Board should allow U.A. to intervene because of some special or exclusive knowledge that could help the Board in its adjudication. E.S. Fox clearly understands the case it must plead. Should it require the special or exclusive knowledge, if any, held by U.A it can summons the appropriate witness to bring that evidence before the Board.

12. Having regard to the foregoing, the Board is satisfied that the U.A. has no legal right to participate in these proceedings and should not be given intervener status.

13. This panel is not seized. The Registrar is directed to list this referral for continuation of hearing.

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**3506-91-U Electrical Contractors Association of Sarnia, Complainant v. Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, International Brotherhood of Electrical Workers, and the IBEW Construction Council of Ontario, Respondents**

**Collective Agreement - Construction Industry - Duty of Fair Representation - Unfair Labour Practice - Employer and employee bargaining agencies for "electrical-trade" portion of ICI sector of construction industry settling renewal of collective agreement expiring April 30, 1992 - Settlement made on February 14, 1992 also amending existing ICI agreement ten weeks prior to its April 30th expiry date - Whether the two e.b.a.'s without jurisdiction to amend existing provincial agreement - Whether employer bargaining agency breaching duty of fair representation - Whether whole settlement should be set aside - Complaint brought by Sarnia contractors dismissed**

**BEFORE:** *M. G. Mitchnick*, Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

**APPEARANCES:** *Bruce Binning*, *Andy Pilat* and *Lawrence Brander* for the complainant; *Scott G. Thompson*, *Karen Petrie*, *Eryl Roberts* and *Peter Bryant* for the respondent Electrical Trade Bargaining Agency; *A. M. Minsky*, *Ralph Tersigni*, *Pat Dillon* and *Donald Lounds* for the IBEW and the IBEW Construction Council of Ontario.

**DECISION OF THE BOARD; April 3, 1992**

1. In this complaint under section 91 (formerly 89) of the *Labour Relations Act* the complainant seeks to set aside the settlement arrived at by the employer and employee bargaining agencies for the "electrical-trade" portion of the ICI sector of the construction industry, with respect to the renewal of the province-wide collective agreement expiring April 30th, 1992. There is a question, as will be seen, whether the complainant really is the "Electrical Contractors Association of Sarnia", but the respondents have agreed to drop their objection in that regard, rather than simply having the matter brought back on in the name of particular contractors.

2. The complaint and agreed statement of facts before the Board make reference to the R.S.O. 1980 section designations of the Act, and the Board for the benefit of consistency will do so here as well. The complaint states:

The Complainant complains that it has been dealt with by the Respondent contrary to the provisions of sections 142, 143, 146 and 151 of the *Labour Relations Act*.

The Complainant is a member of the Respondent, Employer Trade Bargaining Agency of the Electrical Contractors Association of Ontario ("Employer Trade Bargaining Agency"), and as such represents employers for whom the other Respondents have bargaining rights in the Sarnia Area. The Respondents are the designated Employer and Employee Bargaining Agents respectively and are subject to the Province-Wide Bargaining Sections of the *Ontario Labour Relations Act* ("the Act"), and in particular Sections 142, 143, 146 and 151. On or about the 9th day of December 1992 the Respondents entered into an arrangement, a copy of which is attached hereto as Schedule "B", contrary to the provisions of S. 146(2) of the Act. Also in entering into that arrangement, the Respondents have exceeded the authority given to them under S. 142 and 143 of the Act. Further, the Respondents, in attempting to amend the existing Provincial Agreement, a copy of which is attached hereto, and changing the terms and conditions of that Agreement, have acted in bad faith contrary to S. 151 of the Act. The Complainant did not agree with the arrangement set out in Schedule "B".

3. "The arrangement set out in Schedule B" will be described in more detail hereunder, but at the outset it should be noted that the Electrical Trade Bargaining Agency of the Electrical

Contractors Association of Ontario (the "ETBA") was designated by the Minister of Labour on December 12, 1977 as the designated employer bargaining agency under section 139(b) of the *Labour Relations Act*, R.S.O. 1980, c. 228 to represent in bargaining in the industrial, commercial and institutional sector of the construction industry all employers whose employees are represented by the International Brotherhood of Electrical Workers or the IBEW Construction Council of Ontario or any affiliated locals, including IBEW Local 530 of Sarnia. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (the "IBEW-CCO") were jointly designated by the Minister of Labour on December 12, 1977 as the designated employee bargaining agency under section 139(b) of the *Labour Relations Act*, R.S.O. 1980, c. 228 to represent in bargaining in the industrial, commercial and institutional sector of the construction industry all Journeymen and Apprentice Electricians and Journeymen and Apprentice Linemen represented by the International Brotherhood of Electrical Workers or any affiliated locals, including IBEW Local 530. It was agreed that all of the facts on which the case would be argued would be as set out in certain documents and the ETBA's brief, subject to some minor oral elaborations that were made by counsel at the hearing.

4. The current Principal Agreement, which expires April 30, 1992, contains within it the Provincial Section, "the blue pages", setting out those provisions of province-wide application in the ICI sector of the construction industry. The parties note that the Provincial Section must be read in conjunction with the appropriate Local Appendix found in the Local Appendices Section, the white pages, in order to have a complete understanding of what provisions apply in the ICI sector for a particular geographical area. It might be noted that this particular Provincial Agreement goes beyond the ICI sector (and indeed "construction") itself, and covers both Maintenance and Residential work as well.

5. The current Principal Agreement, which expires April 30, 1992, was settled after a strike/lockout which lasted approximately eight weeks and concluded on July 5, 1990. This was not the first strike/lockout for these parties. In fact since the advent of province-wide bargaining in 1978 the negotiations between the parties have resulted in a strike in 1982, which lasted approximately one week (5 working days); a strike in 1986, which lasted approximately two and one half weeks (14 working days); a strike in 1988, which lasted approximately three weeks (17 working days); and a strike/lockout in 1990, which lasted approximately eight weeks (39 working days). This means that the parties were only able to settle a collective agreement without resorting to a strike/lockout in 1978, 1980 and 1984. This pattern, including the increasing duration in time and severity in lost person hours of these strikes, was of serious concern to both the IBEW-CCO and the ETBA, because it was recognized that the economic harm inflicted by the strike/lockout procedure was detrimental to both the members represented by the IBEW-CCO and the contractors represented by the ETBA. Therefore, a commitment between the ETBA and the IBEW-CCO was made, at the time of the 1990 settlement, to explore other methods of resolving disputes without resorting to the strike/lockout procedure, which commitment was embodied in a handwritten memo from the Ministry of Labour to the parties, and appended to the 1990 Memorandum of Settlement. That memo provided:

MEMO TO: ETBA OF ECAO and IBEW/IBEW-CCO

In view of the fact that the above parties to the 1990 negotiations have expressed verbally a willingness to meet during the term of the collective agreement to explore the concept of CIR or a similar program with a view to its use between the parties in Ontario ICI negotiations, the Ministry of Labour undertakes to convene a series of meetings commencing within 90 days of ratification. The meetings will conclude not later than October 31, 1991. The purpose of the meetings will be to ensure that a full and intensive effort is made to establish a CIR type of program.



The terms and conditions agreed to by the parties will be subject to ratification by the IBEW membership.

6. As a consequence of this commitment to explore other methods of resolving disputes without resorting to the strike/lockout procedure, the contractor representatives of the ETBA, including a representative of the Complainant, and the business agents of the affiliated locals, among others, jointly spent three days in the fall of 1990 visiting Washington, D.C. to observe how the Council on Industrial Relations for the Electrical Contracting Industry in the United States resolved disputes. The Council on Industrial Relations ("CIR") has existed in the United States since 1920 as a method of resolving both contract renewal and grievance disputes without work stoppages. Although it was recognized that the Council on Industrial Relations could not simply be transplanted into Ontario, the parties remained committed to developing a made-in-Ontario procedure for resolving contract renewal disputes without resorting to work stoppages.

7. In January 1991 the contractor representatives of the ETBA, including a representative of the Complainant, and the business agents of the affiliated locals, among others, attended a three-day seminar in negotiation technique at Alliston, Ontario, presented by Bernie Flaherty of Cornell University, based on the principles of "Getting to Yes".

8. In late May of 1991, pursuant to the memo attached to the 1990 settlement, the contractor representatives of the ETBA, including a representative of the Complainant, and the IBEW-CCO attended meetings convened in Alliston, Ontario which resulted in a Joint Proposal (the "Joint Proposal") being developed by the parties on May 23, 1991, and which provided as follows:

The Joint Proposal by  
the Electrical Trade Bargaining Agency  
and  
the IBEW Construction Council of Ontario

1. There is a joint union-management commitment to promote unionized construction similar to that established in British Columbia. In support of this joint commitment there is to be an assessment of \$0.20 over and above the total wage package. This is to be divided equally into two funds to be established, effective May 1, 1992. One fund which will deal with promoting unionized electrical construction will be jointly trusted by union and management, the other fund will promote union organizing throughout the province and will be trusted solely by the union.
2. The parties agree to develop the Joint Board as an ongoing policy and grievance settlement device. The Joint Board will provide policy decisions and guidelines for the administration of the collective agreement. (It will not however, alter the language of the collective agreement.)
3. There will be early negotiations by both the ETBA and the CCO committees *authorized to settle for early implementation.*
4. The parties will agree to settle the collective agreement by February 14, 1992. If the parties fail to settle the collective agreement by February 14, all outstanding monetary issues will be referred to final offer selection on February 15, the selector will be appointed before hand by the mutual agreement of the parties. The selector will render his decision within one week *and that decision will be effective from February 15.*
5. After all the other construction trades have settled the Joint Board will

review the monetary settlement in comparison with the other trades, whether agreed to or selected by the selector. If the parties fail to agree on an adjustment, the matter will be referred back to the selector who will adjust the settlement to the average of the two highest settlements of the Ontario construction settlements effective as of the date of the ratification of the highest trade.

6. The above procedure is agreed to for the 1992 round of bargaining on a trial basis only. It is agreed that for that round there will be no strike or lockout.
7. Voting on this matter will be province wide on a one man one vote basis by the membership of the affiliates of the IBEW-CCO.

(emphasis added)

The Joint Proposal was ratified by the ETBA on June 20, 1991 and by the membership of the affiliates of the IBEW-CCO on October 17, 1991. It had previously been approved by the IBEW (i.e., the International), and by the IBEW-CCO, subject to such ratification by the membership. The Ministry of Labour was present for the tabulation of the mail-in ballot from the membership, and the count was 5,068 in favour, versus 1,749 against. On the ETBA side, the vote was 12-1 in favour of the Proposal, the representative from the Sarnia Association being the only one that voted against it. The Proposal also was approved by the Electrical Contractors Association of Ontario's Board of Directors, which includes a director from Sarnia, on a unanimous basis.

9. The Joint Proposal was executed by the parties on December 9, 1991, and by letter dated the same day, the IBEW-CCO gave the ETBA written notice to enter into negotiations to amend the current Principal Agreement for the period between February 15, 1992 and April 30, 1992, as well as written notice to commence bargaining for the renewal of the current Principal Agreement effective May 1, 1992. Throughout January 1992 and the first two weeks of February 1992 the contractor representatives of the ETBA, including a representative of the Complainant who was on the ETBA's core negotiating committee, and the IBEW-CCO negotiated to amend the current Principal Agreement for the period from February 15, 1992 until its expiry on April 30, 1992, and for the renewal of that Principal Agreement for a further term from May 1, 1992 until April 30, 1995. As a result of those negotiations the ETBA and the IBEW-CCO voluntarily settled their outstanding differences on Friday, February 14, 1992, without going to the selector, and entered into two documents which will be set out, being a Memorandum of Amendment and a Memorandum of Settlement. As far as the parties are aware, all electrical contractors in the province of Ontario have implemented the Memorandum of Amendment, effective February 15, 1992, except for three of the fifteen Sarnia contractors that are represented by the Complainant.

10. The Memorandum of Amendment deals with the changes to the *existing* collective agreement made effective February 15, 1992, and provides as follows:

MEMORANDUM OF AMENDMENT dated as of the 14th day of February, 1992.

Between:

THE ELECTRICAL TRADE BARGAINING AGENCY

OF THE

ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO

(the "Contractor")

- and -

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

AND

THE IBEW CONSTRUCTION COUNCIL OF ONTARIO representing the following affiliated Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687 and 1739

(the "Union")

The Contractor and the Union agree to amend the current Principal Agreement between them, including any Residential and Maintenance Agreements referred to in Sections 15 and 16 of the Principal Agreement, the Provincial Linework Agreement, the Communications Agreement and the Local Union Appendices of the Principal Agreement which expires April 30, 1992, (the "Principal Agreement") on the following terms:

1. Effective February 15, 1992, the Wage Package for the Journeyman Electrician is amended by increasing the Wage Package by One Dollar and Ten Cents (\$1.10) per hour.
2. Effective February 15, 1992, the Mileage Allowance, where applicable, will be increased One Cent (\$0.01/km) per kilometer, from Thirty Cents (\$0.30/km) per kilometer to Thirty-One Cents (\$0.31/km) per kilometer.
3. Effective February 15, 1992, the Travel Zone Rates, where applicable, will be increased by Ninety Cents (\$0.90) per day.
4. Effective February 15, 1992, the Room and Board Rates in Local Areas 402 and 1687 will be increased by Twenty-Five Cents (\$0.25) per hour.
5. Effective February 15, 1992, the Room and Board Rates for all other Local Areas, where applicable, will be increased by One Dollar and Fifty Cents (\$1.50) per day.

EXECUTED BY THE PARTIES this 18th day of February, 1992.

The Memorandum of Settlement deals with the period of the renewal collective agreement, now 3 years under the Act, and provides:

MEMORANDUM OF AMENDMENT dated as of the 14th day of February, 1992.

Between:

THE ELECTRICAL TRADE BARGAINING AGENCY

OF THE

ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO

(the "Contractor")

- and -

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

AND

THE IBEW CONSTRUCTION COUNCIL OF ONTARIO representing the following affili-



ated Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687 and 1739

(the "Union")

The Contractor and the Union agree to amend and renew the Principal Agreement between them, which expires April 30, 1992, including any Residential and Maintenance Agreements referred to in Sections 15 and 16 of the Principal Agreement, the Provincial Linework Agreement, the Communications Agreement and the Local Union Appendices of the Principal Agreement as amended by the Memorandum of Amendment dated as of the 14th day of February, 1992 (the "Principal Agreement") on the following terms:

1. Except where specifically amended by this Memorandum of Settlement, the Principal Agreement is renewed for a term of three years from May 1, 1992 until April 30, 1995.
2. Effective May 1, 1992 the attached language changes to the Principal Agreement will be incorporated and take effect in accordance with their terms.
3. Effective May 1, 1992 Local Appendices shall be amended as agreed and signed off by the area ECA and Local Union on or before February 14, 1992.

#### YEAR ONE

1. The Contractor and the Union acknowledge that the Principal Agreement was amended, effective February 15, 1992 with respect to the Wage Package, Mileage Allowance, Travel Zone Rates and Room and Board Rates, which amendments are reflected in a Memorandum of Amendment dated as of the 14th day of February, 1992, and the Contractor and the Union agree that those amendments shall continue in full force in the new Principal Agreement effective from May 1st, 1992.
2. Effective May 1, 1992 the total Package will be increased by Twenty Cents (\$0.20) per hour, as contemplated in the Memorandum of Agreement between the Contractor and the Union dated December 9, 1991, so that the Wage Package will be increased by Ten cents (\$0.10) per hour, which dime will be applied to the IBEW/CCO Fund increasing the Two Cents (\$0.02) per hour to Twelve Cents (\$0.12) per hour. In addition, a new Marketing and Promotion Fund will be established which shall not form part of the Wage Package and which shall be funded by Ten Cents (\$0.10) per hour being deducted from the Total Package.

#### YEAR TWO

1. Effective May 1, 1993, the Wage Package for the Journeyman Electrician is amended by increasing the Wage Package by One Dollar and Ten cents (\$1.10) per hour.
2. Effective May 1, 1993, the Mileage Allowance, where applicable, will be increased Two Cents (\$0.02/km) per kilometer, from Thirty-One Cents (\$0.31/km) per kilometer to Thirty-Three Cents (\$0.33/km) per kilometer.
3. Effective May 1, 1993, the Travel Zone Rates, where applicable, will be increased by Ninety Cents (\$0.90) per day.
4. Effective May 1, 1993, the Room and Board Rates in Local Areas 402 and 1687 will be increased by Twenty-Five Cents (\$0.25) per hour.
5. Effective May 1, 1993, the Room and Board Rates for all other Local Areas, where applicable, will be increased by One Dollar and Fifty Cents (\$1.50) per day.

#### YEAR THREE

1. Effective May 1, 1994, the Wage Package for the Journeyman Electrician is amended by increasing the Wage Package by One Dollar and Twenty cents (\$1.20) per hour.
2. Effective May 1, 1994, the Mileage Allowance, where applicable, will be increased One Cent

(\$0.01/km) per kilometer, from Thirty-Three Cents (\$0.33/km) per kilometer to Thirty-Four Cents (\$0.34/km) per kilometer.

3. Effective May 1, 1994, the Travel Zone Rates, where applicable, will be increased by Ninety Cents (\$0.90) per day.

4. Effective May 1, 1994, the Room and Board Rates in Local Areas 402 and 1687 will be increased by Twenty-Seven Cents (\$0.27) per hour.

5. Effective May 1, 1994, the Room and Board Rates for all other Local Areas, where applicable, will be increased by One Dollar and Fifty Cents (\$1.50) per day.

EXECUTED BY THE PARTIES this 18th day of February, 1992.

11. The purpose of the complaint, as indicated, is to persuade the Board to set aside the above-described (and much-publicized) electricians' settlement. In the final analysis, however, there was one ground only which the complainant asserted gave the Board the right to set aside this product negotiated by the two designated e.b.a.'s. The monetary value of the settlement, while perhaps a driving factor behind the bringing of the complaint, obviously is not something that this Board is called upon to consider. Nor is the potential impact on industry bargaining of a proliferation of post-settlement "ratchet" clauses like the present. The sole ground for challenging the settlement is that it purports to amend the *existing* ICI agreement "mid-term", i.e., effective February 15th, 1992, some ten weeks prior to its April 30th expiry date. And because that action was illegal and forms an integral part of the overall settlement, submits the complainant, the whole settlement must fall (the respondent Unions, it should be noted, agree with the complainant's characterization of the settlement as an integrated one, which must stand or fall in its entirety).

12. The complainant puts forward a number of arguments in support of its challenge. The principal one is the authorizing language of sections 142 and 143 (now 144 and 145) themselves. Section 143(a), for example, provides:

143. Where an employer bargaining agency has been designated under section 139 or accredited under section 141 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement.

The complainant stresses the word "only", and submits that that makes it clear that once the e.b.a.'s have completed their negotiations for a collective agreement, their powers are entirely exhausted until the next round of province-wide bargaining. In further support of this argument, the complainant refers to the comparable section of the Act setting out the powers of an accredited employers' organization, which reads:

128.-(1) Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply with necessary modifications to the accredited employers' organization.

Counsel for the complainant is, of course, entirely familiar with section 146 (now 148) and this Board's interpretation of it, and in particular subsections (1) and (2):

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargain-

ing agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Those sections make it clear, as the Board has ruled a number of times, that no one *other* than the two e.b.a.'s could possibly have any power to amend the e.b.a.'s provincial agreement. Counsel's argument, then, as he concedes, is that *no one* in the ICI sector has the power to adjust the provincial agreement to respond to conditions or circumstances that may arise, in any way. And that, notwithstanding the fact that everyone *else* under the Act is expressly empowered to do so by section 52(5) (now 53(5)), which provides:

Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

13. Counsel in further support of his argument refers to section 146(3) of the Act, which at the time of these negotiations read:

Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

That, counsel submits, is reflective of the fact that the province-wide bargaining legislation was clearly aimed at bringing certainty and stability to the industry for this set period of two (now three) years - and with every contractor governed by this province-wide agreement, which they have no direct say in negotiating, at least having the benefit of knowing for bidding purposes what the expiry date of the existing agreement will be. What the employer bargaining agency has done in this case is so inimical, so contrary to that, and so clearly illegal, the complainant submits, that it must be taken on its face as being in breach of the duty of fair representation provided in section 151 (now 154)(2) of the Act, which states:

A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not.

14. Notwithstanding the concerns raised by Mr. Binning, it obviously would take the clearest of language to convince this Board that the designation of the e.b.a.'s to negotiate the province-wide agreement would not carry with it the traditional and incidental power to amend it as circumstances arise or require - particularly when it is clear that *no one* else would be in a lawful position to do that because of section 146(2). To discount Mr. Binning's argument, however, it is necessary to provide a meaning to the words "but only for the purpose of conducting bargaining and concluding a provincial agreement", as specifically used in section 143(a). But in fact, that meaning can be gleaned from a comparison with section 128(1) itself, which once again provides:

Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply with necessary modifications to the accredited employers' organization.

The Board, in giving a meaning to *those* words, has made it clear that what they accomplish is to leave the accredited organization responsible not only for the *negotiation* of the collective agreement on behalf of all of the employers affected, but also the party responsible for *administering* it. That very point was addressed early on in the case of *Ainsworth Electric*, [1977] OLRB Rep. July 399, in which the Board had this to say:



6. It is our view that where an accredited employers' organization, as here, has concluded a collective agreement as exclusive bargaining agent, it must accept the responsibility of enforcing the terms of that contract. The exclusive bargaining agent has no right to abandon any part of this responsibility in favour of some other designated person; ...

8. Section 120 of the Act provides for the fair representation of employers represented by the accredited employers' organization. If, as the applicant submits, either the employers' organization or an individual employer in the unit represented may exercise the right (or the responsibility) of enforcing the collective agreement, then section 120 becomes meaningless and mere surplusage. Indeed, to accept the applicant's submission would be confusing a situation, as here, where the employers have appointed an exclusive bargaining agent which has entered into a collective agreement on their behalf, with a more fractionated situation where the parties might have bargaining jointly but concluded a multiplicity of separate collective agreements.

9. Further, our decision in the instant case that the only proper party to bring an application under section 112a is the accredited employers' organization is consistent with the reasoning of the Board in the *Electrical Power Systems Construction Association* case, [1976] OLRB Rep. Dec. 825.

10. Accordingly, the application is dismissed for want of status by the applicant to carry the matter under section 112a.

Thus the words in sections 142 and 143, written later, appear intended to do exactly the opposite: that is, to make it clear that it is *only* the power to negotiate the collective agreement on behalf of the contractors or affiliated bargaining agents that is removed and assigned by the statute to the e.b.a.'s, and not the responsibility to be involved at every formal step in the administration of it, as the Board (in theory at least) had found section 128 to provide. And that, we agree with counsel for the ETBA, is why the expansive listing of potential "parties" in section 147(3) (now 149(3)), for the purposes of a grievance application under section 124 (now 126) of the Act, was considered a necessary clarification. In the Board's view, therefore, the normal power to vary or amend the terms of the e.b.a.'s' own agreement is not removed from them or affected in any way by the closing words of either section 142 or 143(a).

15. That conclusion, it might be added, is consistent with the sort of thing the Board has always intuitively been saying with respect to the question of how mid-term modifications are to be dealt with under the regime of province-wide ICI bargaining. In *Lummus Canada*, for example, [1983] OLRB Rep. Sept. 1504, the Board had a situation where the employer-contractor was facing heavy pressure from the owner to increase productivity, and wished to vary the Electricians' province-wide agreement to provide for a 4-day work-week (as it had with the Plumbers). The Board observed:

24. At the root of the present case is the arrangement between Lummus and the UA which as we have found Lummus is coercing the complainant [IBEW Local 894] to accept. It is not for this panel of the Board to decide whether that arrangement between the UA and Lummus is itself a violation of section 146(2) of the Act. That complaint is not before this Board nor are the parties to such an arrangement before this Board. We cannot help but notice, however, that in all the evidence relating to that arrangement no mention was made of either the Employer or the Employee Bargaining Agency which are the designated parties to that provincial agreement. We mention this because with reference to the present case we are of the view that the problem faced by Lummus and Eldorado is not insoluble. Nothing prevents the complainant provincial council and its counterpart, the Employer Bargaining Agency, from amending the present electricians' provincial agreement to specifically accommodate the kind of problem faced by Lummus at the Eldorado job site. The employer and Employee Bargaining Agencies have exclusive bargaining rights and it is their obligation to be responsive to the needs of the construction industry. The point, however, is that it is the two bargaining agencies which must ultimately formulate any amendment to that provincial agreement, and this is not something that Lummus can do on its own.

Similarly, see *Fahrhall Mechanical Limited*, [1982] OLRB Rep. Aug. 1174, at paragraph 11, and *C. E. Lummus Canada Ltd.*, [1983] OLRB Rep. Oct. 1688, at paragraph 19. And more indirectly, see *Peter Walter Dow*, [1981] OLRB Rep. June 692.

16. Nor do we find the complainant's argument on the basis of the expiry date set out in section 146(3) to have merit. What that section does, of course, is to set a common expiry date for the entire ICI sector. And more to the point, that means that all the parties who bargain within that sector reach their "open period", and the right to strike or lock-out, at exactly the same time. *That*, in our view, is the "stability", or containment of the potential damage to the industry of lawful strikes or lock-outs, that section 146(3) went into the Act to provide. Mr. Binning does not dispute that one set of bargaining parties can sit down and settle the terms of their new collective agreement as much in advance as they like - so long, he would add, as those new terms and conditions are not purported to be made effective any earlier than the original April 30th expiry date. Indeed, *one* of the trades in the sector is always going to have to settle first. Thus Mr. Binning's challenge, once again, is solely with respect to the Memorandum of Amendment, i.e. that aspect of the settlement that put the new rates and benefit adjustments into effect as of February 15th. But that was carried out in exactly the same way that it is carried out by everyone else seeking to comply with the provisions of section 52(5) of the Act. Because that section permits an amendment to any of the provisions of a collective agreement except for that pertaining to its term, any "advance" revisions to the collective agreement must be done in just the manner that was followed here: i.e. with one agreement amending the conditions of the existing collective agreement for the remainder of its term, and another dealing with the conditions that will be contained or continued in the parties' *new* collective agreement, when it comes into effect on its originally-determined commencement date. None of that has the effect of permitting the parties on their own to alter the "open" (or "strike") period established by the term of the agreement, and the principle behind section 146(3) (and 52(5)) is maintained.

17. What it *does* do, we fully recognize, is to alter the date at which the various contractors bound by this statutorily-mandated provincial agreement have to deal with an increase. And for that reason, if there *is* going to be some legal ground upon which the exercise of the e.b.a.'s authority to amend their own agreement has the potential for being challenged, it appears to us that it would be through the provisions of section 151 (now 154), referred to in the third ground of Mr. Binning's argument. In particular, given the way commercial contracts are bid and entered into in the construction industry, as Mr. Binning fairly points out, and the fact that the e.b.a.'s become the sole and exclusive bargaining agents with the power to bind the whole industry, the question of adequate *notice* to the contractor-group takes on added significance.

18. In the present case, however, the contractors were on notice from the time of initial circulation for ratification of the Joint Proposal signed on May 23, 1991, that any province-wide changes that would ultimately come to be agreed to, or imposed through the procedure negotiated for third-party selection, would go into effect on February 15th, 1992. The contractors knew back then, in other words, that the next adjustment date for their costs under the province-wide collective agreement was not going to be April 30th, 1992, but rather February 15th.

19. On the facts before us, therefore, we all are of the opinion that the present complaint must be dismissed.

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**0762-91-G The Electrical Power Systems Construction Association**, Applicant v. Ontario Allied Construction Trades Council, International Association of Heat and Frost Insulators and Asbestos Workers, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and James C. Cord, Respondents

**Construction Industry - Construction Industry Grievance - Remedies - Employer grieving against employee and against union alleging improper claim and receipt of room and board allowance - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

**APPEARANCES:** *John C. Field* and *V. W. Medri* for the applicant; *A. M. Minsky*, *John Marchildon* and *Joe de Wit* or the respondents.

**DECISION OF THE BOARD;** April 23, 1992

1. The names of the respondents are amended to read: "Ontario Allied Construction Trades Council, International Association of Heat and Frost Insulators and Asbestos Workers, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and James C. Cord".

2. This is a referral of a grievance to arbitration pursuant to section 126 (formerly section 124) of the *Labour Relations Act*.

3. The grievance, which is dated March 27, 1991, reads as follows:

EPSCA grieves against James Cord and against the Union that James Cord has violated Article 19 of the Master Portion of the EPSCA/OACTC Collective Agreement by improperly claiming and receiving Room and Board Allowance.

EPSCA claims damages in the amount of \$11,650.50 the value of Room and Board Allowance monies paid to James Cord, plus all appropriate interest.

4. The grievance was initially addressed only to James Cord and to Joe de Wit, the Business Manager of the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 ("Local 95"). However, it was subsequently amended to include as addressees John Marchildon, the Secretary-Treasurer and Business Manager of the Ontario Allied Construction Trades Council (the "Council") and Andre Chartrand, an International Vice-President of the International Association of Heat and Frost Insulators and Asbestos Workers (the "International") and Supervisor of Local 95.

5. This grievance referral was filed with the Board on June 6, 1991, and was initially scheduled to be heard on June 20, 1991, but was subsequently adjourned to July 18, 1991 on the agreement of the parties. When the matter came on for hearing before this panel of the Board on that day, respondents' counsel requested that the referral be dismissed pursuant to section 71(1) of the Board's Rules of Procedure on the grounds that it failed to make out a *prima facie* case for the remedy requested. After hearing extensive submissions regarding that request, we ruled that we would reserve our decision on that matter and deal with it, if appropriate, after completion of the



hearing of the merits. The Board then offered the parties a number of potential hearing dates in the Fall and Winter of 1991, all but the last two of which were rejected by the parties. Thus, the matter was listed for continuation of hearing on December 5 and 12, 1991. However, both of those dates were also adjourned on the agreement of the parties, with the hearing being rescheduled to take place on March 4 and 16, 1992. (The parties initially wished to have this grievance heard together with Mr. Cord's discharge grievance, which has also been referred to the Board pursuant to section 126 of the Act, in File No. 0788-91-G. However, they subsequently elected to defer proceeding with the discharge grievance until after the hearing of the instant referral had been completed.)

6. At the March 4 hearing, applicant's counsel provided the Board with a statement of facts and the nine exhibits referred to therein. Respondents' counsel advised the Board that his clients were not putting the applicant to the strict proof of those facts and documents for the purpose of these proceedings, on the understanding that this would be without prejudice to any position his clients might take in the proceedings in File No. 0788-91-G or in any other proceedings. Similarly, applicant's counsel stipulated that the presentation of the facts in this form was not to be taken as a limiting or prejudicial factor regarding other evidence which might be relied upon in respect of the discharge grievance. Thus, it was common ground among the parties that the following statement of facts should be treated as being undisputed for purposes of the instant case, but without prejudice to the parties' positions in any other proceedings:

#### Statement of Facts

1. Ontario Hydro as a member of the Electrical Power Systems Construction Association (hereinafter "EPSCA") is bound by the terms of the Collective Agreement between the Ontario Allied Construction Trades Council (hereinafter "OACTC") and EPSCA.
2. The International Union of Heat and Frost Insulators and Asbestos Workers as a member of the OACTC is bound by the terms of the Collective Agreement between EPSCA and the OACTC.
3. James Cord (hereinafter "Cord") at all material times was an employee of Ontario Hydro and a member of the International Union of Heat and Frost Insulators and Asbestos Workers (hereinafter "the union"). Cord as a member of the union at all material times was bound by the terms and conditions of the Collective Agreement.
4. Cord commenced his employment at Ontario Hydro's Lambton generating station on August 17, 1989. At that time he applied for a Room and Board Allowance pursuant to the terms of the Collective Agreement. Attached as Exhibit "A" of the Statement of Facts is a copy of the Master Portion of the Collective Agreement between the OACTC and EPSCA and the International Association of Heat and Frost Insulators and Asbestos Workers Appendix.
5. On February 18, 1991, James Cord pleaded guilty to the offence of Fraud Over \$1,000.00 (Section 380(1)(a) of the Criminal Code of Canada) as a result of improperly obtaining \$11,650 (eleven thousand, six hundred and fifty dollars) in Room and Board Allowance monies from Ontario Hydro from on or between August 17, 1989, and March 28, 1991. Attached as Exhibit "B" is a certified copy of the Information recording Cord's entering of a plea of guilty to the charge of Fraud Over \$1,000.00.
6. On August 7, 1989, James Cord and his wife, May Cord, executed an Agreement of Purchase and Sale to purchase 451 Cromwell Street in Sarnia, Ontario. Attached as Exhibit "C" of the Statement of Facts is a copy of the Agreement of Purchase and Sale signed by James and May Cord.
7. On August 23, 1989, a Transfer/Deed of Land form was registered in the Land Registry Office in Sarnia which shows James Cord and his wife as transferees for 451 Cromwell Street, Sarnia, Ontario, taking the property as joint tenants. Attached as Exhibit "D" of the Statement

of Facts is a copy of the Transfer/Deed of Land form, along with a copy of the Land Transfer Tax Act Affidavit sworn by Cord.

8. Cord, at the time he commenced employment on August 17, 1989, listed as his regular residence on the application for Room and Board Allowance, Unit #22, 75 Ventura Drive, St. Catharines, Ontario. Attached as Exhibit "E" of the Statement of Facts is the application form signed by Cord to obtain Room and Board Allowance.

9. Cord, at the time of his application for Room and Board Allowance on August 17, 1989, provided a copy of his Driver's License showing his residence as 75 Ventura Drive, Unit 22, St. Catharines, Ontario. Attached as Exhibit "F" of the Statement of Facts is a copy of the said Driver's Licence. Attached as Exhibit "G" of the Statement of Facts is a copy of Cord's Driver Licence History from the Ministry of Transportation which shows Cord's address as of September 21, 1989, as 451 Cromwell Street, Sarnia, Ontario.

10. On or about January 8, 1991, Cord responded to Ontario Hydro with respect to its request for up-to-date address information for Cord's T4 slip to be sent to his home address. Cord advised Ontario Hydro that he had a new home address, 44 Louis Avenue, St. Catharines, Ontario, and also a temporary address - mailing, as c/o T. McQueen, 855 Lanark Crescent, Sarnia. Attached as Exhibit "H" of the Statement of Facts is a copy of the T4 information slip with Cord's response.

11. On March 22, 1991, James Cord completed a second application for a Room and Board Allowance listing 44 Luis [sic] Avenue, St. Catharines, Ontario, as his regular residence. Attached as Exhibit "I" of the Statement of Facts is a copy of the second application signed by Cord for Room and Board Allowance.

[The exhibits referred to in the Statement of Facts have not been reproduced in this decision.]

7. Counsel referred the Board to the following parts of the Master Portion of the Collective Agreement during the course of their able submissions:

#### Article 19

#### GENERATION PROJECTS DAILY TRAVEL ALLOWANCE

#### AND ROOM AND BOARD

• • • •

#### ROOM AND BOARD

19.2 The following conditions will apply for employees whose regular residence\* is more than 97 radius kilometers from the project:

- (a) An Employer may supply either:
  - (i) Room and board in camp or a good standard of board and lodging within a reasonable distance of a project; or
  - (ii) a subsistence allowance;

subject to Section 19.2(b), (c) and (d) below.

- (b) An employee may exercise his option not to stay in a camp or accept room and board. An employee who exercises this option and qualifies for subsistence allowance shall receive a subsistence allowance of \$42.00 per day (effective May 1, 1991, \$45.00 per day) for each day worked or reported for subject to Sections 19.2(c) and 19.2(d) below.

- (c) To qualify for subsistence allowance an employee must maintain temporary accommodation at or near a project. Employees who travel daily to locations beyond 97 radius kilometers from the project will be entitled to \$25.50 per day worked or reported for.
- (d) An employee employed at the Pickering or Darlington Project who qualifies for a subsistence allowance as provided for above shall receive a subsistence allowance of \$27.00 per day for each day worked or reported for.

\* An employee's 'regular residence' is:

- 1. The place where the employee maintains a self-contained, domestic establishment (a dwelling house, apartment or similar place of residence where a person generally eats and sleeps and for which he can show proof of financial commitment). This is in contrast to a boarding house facility which is not self-contained; and
  - 2. The employee normally resides in the residence except for those periods of time when, because of the location of the work, the employee is forced to obtain temporary accommodation at that work location.
- 19.3 An employee shall not qualify for daily travel allowance or room and board allowance as provided for in Sections 19.1 and 19.2 above when such employee reports for work but does not remain at work for his scheduled daily hours unless excused by an authorized representative of his Employer.
- 19.4 An employee who maintained a regular residence within the geographic area for the purposes of employment and who relocates outside the geographic area will not be entitled to an increase in travel or room and board allowance entitlement as a result of this relocation.

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#### Article 29

#### GRIEVANCE PROCEDURE

- 29.1 Grievances within the meaning of the grievance and arbitration procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of this Agreement. In the event of any dispute concerning the meaning or application of any provision of this Agreement or a dispute concerning an alleged violation of this Agreement, there shall be no suspension or disruption of work, but such dispute shall be treated as a grievance and shall be settled, if possible, by EPSCA and the appropriate Union. In the interests of expediting the procedure, the parties shall process grievances in the following manner:

The grievance procedure and arbitration procedure in Article 30 do not apply to jurisdictional disputes.

#### 29.2 PRELIMINARY DISCUSSION

Disputes arising out of the interpretation or alleged violation of this Agreement should, if possible, be settled by discussion between the employee and/or his steward and the employee's supervisor. If the employee affected is a foreman, the preliminary discussion will be between the Accredited Union Representative and the foreman's supervisor.

#### 29.3 FIRST STEP

If a dispute cannot be resolved by this method, the accredited Union Representative for the trade concerned may file a formal grievance on the prescribed form with the



Manager of Construction or the Field Construction Manager within fifteen (15) working days of the alleged grievous act.

Within ten (10) working days of the filing of the grievance, the Manager of Construction or Field Construction Manager shall investigate the grievance and convene a First Step meeting which he or the Accredited Union Representative considers necessary to resolve it.

The Management Committee shall be comprised of the Manager of Construction or the Field Construction Manager or their designate plus at least one representative of the Employer named in the grievance. The Union Committee shall include at least two persons, one of whom shall be the Accredited Union Representative for the grievor.

The Manager of Construction or Field Manager shall give his reply on the prescribed form to the Accredited Union Representative within five (5) working days from the date of the First Step meeting.

Copies of completed grievance forms signed by the appropriate parties shall be filed by the Manager of Construction or the Field Construction Manager with the General Manager of EPSCA. The Accredited Union Representative for the grievor will file a copy with the Council.

#### 29.4 SECOND STEP

Within ten (10) working days after the disposition has been issued under the First Step of this procedure, the Accredited Union Representative may refer the grievance on the prescribed form to EPSCA's Grievance Officer. A copy of the grievance form shall be forwarded by the Accredited Union Representative to the International Representative of the Union.

The EPSCA Grievance Officer shall investigate the grievance and convene a meeting which he or the International Representative considers necessary to resolve it and give his reply on the prescribed form to the International Representative of the Union within five (5) working days from the receipt of the grievance form which was completed at First Step.

The Management Committee shall comprise the EPSCA Grievance Officer plus two other Management Representatives, plus two other Management Representatives [sic], one of whom shall be a representative of the Employer named in the grievance. The Union Committee shall be comprised of at least the International Representative or his designate for the grievor. If the International Representative elects to appoint a designate, he shall inform EPSCA in writing of the name of the designate and the duration of appointment.

#### 29.5 EPSCA OR COUNCIL GRIEVANCES

The processing of EPSCA or Council grievances will begin at the Second Step. EPSCA or the Council may submit either policy or specific grievances. Such policy or specific grievances shall be submitted within thirty (30) days of the alleged grievous act.

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### Article 30

#### ARBITRATION

- 30.1 If any dispute about the interpretation or application of particular clauses of this Agreement or about an alleged violation of this Agreement cannot be settled through the grievance procedure outlined in Article 29, the matter may be submitted within

thirty (30) days of its failure of settlement by grievance procedure by either EPSCA or the Council to a Board of Arbitration for adjudication.

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- 30.2 The arbitration board shall have no power to add to or subtract from or modify any of the terms of this Agreement. The arbitration board shall not substitute its discretion for that of the parties except where the board determines that an employee has been discharged or otherwise disciplined for cause when this Agreement does not contain a specific penalty for the infraction that is the subject matter of the arbitration. In such cases, the arbitration board may substitute such other penalty for the discharge or discipline as to the arbitration board seems just and reasonable in all circumstances. The arbitration board shall not exercise any responsibility or function of the parties. The arbitration board shall not deal with any matter not contained in the original statement of grievance filed by the party referring the matter to arbitration.

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(Counsel advised the Board that the copy of the Collective Agreement entered as an exhibit in these proceedings is not the actual document in force at the time of the grievance, but rather is an updated agreement which contains language that is identical in all material respects other than the monetary amounts, which have been revised but have no direct bearing on these proceedings since there is no dispute concerning the amount of room and board allowance received by Mr. Cord.)

8. Reference was also made during the course of argument to sections 45(10), 51, and 126(3) (formerly sections 44(10), 50, and 124(3)) of the Act, which provide as follows:

45(10). The decision of an arbitrator or of an arbitration board is binding,

- (a) upon the parties;
- (b) in the case of a collective agreement between a trade union and an employers' organization, upon the employers covered by the agreement who are affected by the decision;
- (c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, upon the members or affiliates of the council and the employer or the employers covered by the agreement, as the case may be, who are affected by the decision; and
- (d) upon the employees covered by the agreement who are affected by the decision,

and the parties, employers, trade unions and employees shall do or abstain from doing anything required of them by the decision.

51. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

126(3). Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45 (6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(Although both counsel referred to section 51 as the statutory basis for bargaining unit employees such as Mr. Cord being bound by the collective agreement, it appears that the applicable statutory provision is actually section 52(1) which, among other things, makes a collective agreement

between an employers' organization and a council of trade unions "binding ... upon the employees in the bargaining unit defined in the agreement".)

9. Counsel for the respondents submitted that the application should be dismissed on the following grounds:

- (1) the grievance is inarbitrable;
- (2) the respondents other than the Council are not proper parties to a grievance under the Collective Agreement or a referral under section 126; and
- (3) the Board is without jurisdiction under section 126 or otherwise to grant the relief claimed in the grievance as against any of the respondents.

It was his position that the grievance was inarbitrable in relation to the International and Local 95 because neither of them was alleged to have breached the Collective Agreement, and because no relief was sought against either of them. He submitted that it was also inarbitrable against Mr. Cord because he is not a party to the Collective Agreement, and neither a grievance against an employee nor a referral to the Board of a grievance against an employee is permitted by the Collective Agreement, the Act, or the arbitral jurisprudence. After referring the Board to decisions in which arbitrators declined to award damages against persons who were not parties to a collective agreement, he asserted that in the forty or fifty years that grievance arbitration awards have been rendered, there has not been a single reported case in which damages have ever been awarded against an employee. He acknowledged that the Council could be a proper respondent to a referral of this type of grievance if the applicant had requested a declaration rather than an award of damages. It was his position that damages could not be awarded against the Council as the grievance does not allege any contravention of the Collective agreement by the Council. However, he acknowledged that EPSCA could have brought a grievance against the Council seeking a declaration as to whether or not Mr. Cord properly or improperly claimed and received room and board allowance. He further contended that, having obtained such a declaration, EPSCA could then commence action against Mr. Cord in a court of law to seek recovery of damages from him directly. That process, which respondents' counsel referred to as the "theoretically valid model", was based upon various court decisions, including *Hamilton Street Railway Co. v. Northcott* (1966), 58 D.L.R. (2d) 708 (S.C.C.), and *MacIsaac v. Great Lakes Forest Products Limited* (1981), 21 C.P.C. 310 (O.H.C.). He also suggested that, subject to Mr. Cord's right to grieve any disciplinary action taken against him, the employer might have recovered the money in question by imposing discipline upon Mr. Cord in the form of a monetary penalty. In support of that contention, he referred the Board to *Ontario Hydro*, [1983] OLRB Rep. Sept. 1547, and *Re H. Fine & Sons Ltd. and Teamsters Union, Local 91* (1984), 15 L.A.C. (3d) 236 (Roach). Reference was also made to *Re United Electrical Workers, Local 512, and Standard Coil Products (Canada) Ltd.* (1971), 22 L.A.C. 377 (Weiler), in support of the proposition that, if it had not elected to discharge Mr. Cord, the employer could have exercised a right of set-off to recover the room and board allowance paid to him.

10. In responding to those submissions, applicant's counsel confirmed that his client is not seeking an award of damages against the Council, the International, or Local 95. However, he asserted that the Council is a necessary and proper respondent in these proceedings because it is the other party to the Collective Agreement, and further asserted that the International and Local 95 are necessary and proper parties because they are Mr. Cord's bargaining agent. He also noted that the Board has held that the local union is the "party" adverse in interest to which delivery of



the written grievance must be made to fulfill the delivery requirements of section 126(2): *The Electrical Power Systems Construction Association*, [1990] OLRB March 243. It was his contention that EPSCA can obtain (on behalf of Ontario Hydro) restitution from Mr. Cord in the form of damages equal to the monies which Mr. Cord obtained by breaching Article 19 of the Collective Agreement, plus interest, because Mr. Cord was at all material times bound by the Collective Agreement and the provisions contained in it. In support of that contention, he referred the Board to section 51 of the Act. He submitted that the language of that section makes the Collective Agreement “binding” on each bargaining unit employee in the sense of holding the employee to the contractual or legal obligations contained in the Collective Agreement, and that it therefore permits the employer to pursue a remedy against an employee for breaching one or more of those obligations. It was his contention that section 45(10) of the Act further supports his client’s position. Counsel also argued that to apply the “party to/bound by” distinction in order to deny arbitration as a means of recovering funds wrongly paid out would insulate employees from relief for breaches of the collective agreement to which they, by statute, must adhere. He referred to the common situations in which a union seeks redress from an employer on behalf of an individual grievor, and in which a union seeks relief from an employer through that employer’s bargaining agency, as comparable analogies illustrating the irrelevancy of that distinction. He further suggested that if the Council’s position were correct, it would not be able to name Ontario Hydro as a respondent in Mr. Cord’s discharge grievance referral, nor to obtain any remedy against Ontario Hydro in those proceedings, as it is EPSCA and not Ontario Hydro which is a party to the Collective Agreement. Thus, he submitted that principles of fairness and reciprocity should govern the situation and result in Mr. Cord being found to be a proper respondent against whom relief can be awarded in the instant case. In disputing opposing counsel’s suggestion that the employer could recoup such a loss by imposing a monetary penalty on the employee, he referred the Board to section 8 of the *Employment Standards Act*, which precludes an employer from claiming a set-off against wages, making a claim against wages for damages, etc. He also noted that even if an employer could in some instances obtain a payment of the funds by such means, that approach would not be available in situations where an employer was unaware of the loss until after the employee had left its employ. Applicant’s counsel suggested that discipline is not an adequate remedy in a situation of this type, which he characterized as being rather unique in that, unlike many other situations such as those involving unlawful strikes, the union is not alleged to have been involved in the employee’s wrongdoing and thus cannot have damages awarded against it. In commenting on the remedial relief sought in these proceedings, he noted that in the initial paragraph of the grievance, his client grieved that James Cord has violated Article 19 by improperly claiming and receiving room and board allowance. He submitted that a request for a declaration is implicit in that portion of the grievance. Thus, it was his position that EPSCA is seeking not only damages but also a declaration, as the Board’s finding of a breach of Article 19 would be declaratory in nature. In addition to commenting on the cases cited by respondents’ counsel, applicant’s counsel referred the Board to a number of other cases during the course of his submissions, including *Re Samuel Cooper & Co. Ltd. and International Ladies’ Garment Workers’ Union et al.* (1973), 35 D.L.R. (3d) 501 (Ont. Div. Ct.); *Shell Canada Limited v. United Oil Workers*, [1980] 2 S.C.R. 181; and *Re United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, etc., Local 800, and Bennett and Wright Contractors Ltd.* (1969), 20 L.A.C. 187 (Godin).

11. In his reply argument, respondents’ counsel disputed the contention that a request for declaratory relief is implicit in the grievance. In commenting on Articles 29 and 30, he submitted that neither of them expressly or implicitly permits EPSCA to file a grievance against an individual employee. Although he acknowledged that Mr. Cord was bound by the Collective Agreement by virtue of section 51 of the Act, he submitted that neither section 51 nor section 45(10) gives an employer or employers’ association the right to seek damages against an employee through grievance arbitration. In this regard he adopted by reference the argument he had presented to another

panel of the Board in an earlier case involving EPSCA and the Council, as summarized in *The Electrical Power Systems Construction Association*, [1990] OLRB Rep. March 243, at paragraph 24:

The respondents concede that employees are bound by the collective agreement through the provisions of section 50 of the Act, and bound by an arbitration board's decision through the provisions of section 44(10) of the Act. However, they submit that the issue of whether employees are so bound is a different matter from the issue before this Board: whether at the instigation of an employer party to the collective agreement the arbitration mechanism is available for enforcing alleged obligations contained therein against individual employees. The respondents submit that the foundation of collective bargaining is the bilateral relationship between the employer (or its authorized representative, such as EPSCA) on one hand, and the union (or its authorized representative, such as the Council) on the other hand. To allow these disputes to be arbitrated on the merits would undercut the very rationale for and structure of collective bargaining. The respondents note that this is a case of first impression, and argue there is good reason for over forty years of jurisprudence without this question arising for arbitration. They submit this lengthy dormant period reflects the abilities of the bilateral parties to govern their affairs, and demonstrates that there has not been a serious, or even detectable, problem of employers being left without remedies to enforce alleged obligations. If that were the case, argue the respondents, this issue would have been adjudicated long ago. Put colloquially, "if it ain't broke, don't fix it."

Counsel sought to distinguish an EPSCA grievance against an employee from a Council grievance against an employer, such as Ontario Hydro, on the grounds that the latter has been recognized as appropriate, even though it is EPSCA and not Ontario Hydro which is a party to the Collective Agreement, because grievance arbitration is traditionally between a union on one side and an employer on the other side, and because the employer is a necessary party if an effective remedy is to be granted in many instances, such as those involving discharge grievances. He further suggested that Ontario Hydro, as a member of EPSCA, is in a different position from Mr. Cord, who is not a member of the Council.

12. Very few of the decisions to which we were referred during the course of argument are of any real assistance, as most of them are readily distinguishable from the instant case. For example, the Board's statement in *J.G. Rivard*, [1976] OLRB Rep. Sept. 540, at paragraph 13, that "it is an inescapable conclusion that [the predecessor of section 126] contemplates a dispute between the employer, etc. on the one hand, and the union, etc. on the other hand", was made in the context of a grievance referral in which an accredited employers' organization (the Mechanical Contractors Association of Ottawa) was seeking to obtain "Industry Fund" payments from the respondent employer which, although not a member of the Association, fell within its accreditation certificate and was bound by the Association's collective agreement (with a local of the UA), which called for payments to be made to that fund by each employer bound by the agreement. All that the Board decided in that case (which was decided in the context of a provision which read "either party" where section 126 now reads "a party") was that a dispute arising "between two entities of like interest and constituting an internal dispute between them" was not a "grievance" within the meaning of section 126's predecessor: see paragraph 17 of the decision. (An application for judicial review of that decision was dismissed by the Divisional Court in a decision released on November 23, 1976.) The same is true of the second *Rivard* case (*J.G. Rivard Limited*, [1980] OLRB Rep. July 1009) in which the Board reached an identical conclusion in the context of a legislative amendment by which the words "a party" were substituted for "either party" in section 126(1) (then section 112a(1) of the Act), and by which what is now section 147(3) was added to the Act. (That decision also went on to indicate that although Industry Fund payments could not be collected under section 126, what is now section 91 of the Act did provide a mechanism under which their payment could be enforced.)



13. The powers of an arbitration board to award damages and make affirmative directions in appropriate cases are well established. For example, in *Re Samuel Cooper & Co. Ltd. and International Ladies Garment Workers' Union et al.* (1973), 35 D.L.R. (3d) 501, the Divisional Court dismissed an application for judicial review of an arbitration award in which the company was not only ordered to pay damages for violating its collective agreement obligations, but was also ordered to require all of its employees to become members of the union, to deduct union dues from their wages, to make contributions to various funds, and to cease using contractors. However, in that case, as in all of the other cases to which we have been referred, the orders were made against a party to the collective agreement, and not against an individual employee. It is also well established that such arbitral powers can be exercised not only against an employer at the instance of a union (on its own behalf or on behalf of one or more of the employees whom it represents), but also against a union at the instance of an employer. See, for example, *Shell Canada v. United Oil Workers*, [1980] 2 S.C.R. 181.

14. A number of previous decisions have noted that there is a distinction between being a party to a collective agreement and being bound by it: see, for example, *The Electrical Power Systems Construction Association*, [1976] OLRB Rep. Dec. 825, and *Ontario Hydro*, [1986] OLRB Rep. Aug. 1137, in which the Board held that although unions which are members of the Council are bound by the collective agreement between the Council and EPSCA, they are not parties to the agreement and, therefore, do not have status to refer grievances to the Board under section 126 of the Act. However, those cases are not of assistance in deciding the present case as they did not determine the effect of being so bound.

15. This is not the first case in which EPSCA and the Council have joined issue before the Board concerning the recoverability, through arbitration, of room and board (subsistence) allowance improperly received by a former employee. That issue was argued as a preliminary objection before another panel of the Board in *The Electrical Power Systems Construction Association*, [1990] OLRB Rep. March 243. In that case, EPSCA sought to recover room and board (subsistence) allowance totalling \$18,468.50 which had allegedly been improperly claimed and received by a former Ontario Hydro employee while working as a teamster at the Darlington Nuclear Power Generating Station Project. (In another grievance which was being heard together with that one, EPSCA sought an order requiring a labourer formerly employed by Ontario Hydro to either return certain tools and equipment (valued at slightly under \$500) or make payment for those items.) However, after hearing the parties' submissions, that panel concluded (in paragraph 34) that it was "more appropriate in the circumstances, given the importance and uniqueness of this issue, to hear the entire case and to deal with this issue, if appropriate, after completion of the proceedings." The panel then proceeded to dismiss the room and board (subsistence) allowance recovery grievance on the grounds of undue delay. The other grievance was subsequently withdrawn by the applicant with leave of the Board. Thus, the issue remained undecided.

16. In an earlier referral, EPSCA sought to recover approximately \$14,000 in respect of room and board allowance which had been paid to an individual named Brian Fleming (formerly employed by Ontario Hydro as an ironworker-welder) as a result of an allegedly inaccurate declaration regarding his regular residence. One of the two preliminary objections raised by the respondent in those proceedings (the International Association of Bridge, Structural and Ornamental Iron Workers) was that the applicant could not recover monies from an individual through the respondent trade union as a party to a grievance. However, the Board (differently constituted) dismissed the grievance on the basis of the union's other preliminary objection (untimeliness) and, therefore, did not consider it appropriate to reach a determination on that issue: see *The Electrical Power Systems Construction Association*, [1987] OLRB Rep. Aug. 1079. Prior to that grievance being filed by EPSCA, Ontario Hydro had attempted to recover those funds through a civil action



which it commenced against Mr. Fleming in February of 1985. The denial of a motion to dismiss that action was overturned on appeal in August of 1985, on the grounds that it was not possible to deal with Ontario Hydro's claim against Mr. Fleming without referring to the Collective Agreement and placing an interpretation on it, which the courts were precluded from doing by section 3(3) of the *Rights of Labour Act*, and section 45(1) (formerly section 44(1)) of the *Labour Relations Act*. (A subsequent appeal by the employer to the Divisional Court was dismissed, as was the employer's motion for leave to appeal to the Ontario Court of Appeal.)

17. An attempt by an employer to obtain damages from individual employees who engaged in an unlawful strike was unsuccessful in *Dover Corporation (Canada) Limited*, [1976] OLRB Rep. Dec. 807. Having found that the employees' union, through its business agent, had called the unlawful strike, and having directed the union to compensate the company for all real losses suffered as a result of the strike, the majority wrote as follows in declining to order damages against the individual employees:

15. The applicant company seeks damages from the individual employees against whom separate grievances have been filed. The Board, having regard to its findings in respect of the union's involvement and having regard to the dependency of the individual employees upon the trade union for their employment and having regard to the Board's direction against the union which will make the company "whole", refuses, in the circumstances of this case, to order damages against the individual employees.

It appears from that passage that the Board may have assumed that it would have jurisdiction to make such an award if it found it appropriate to do so. However, there is nothing in the decision which indicates that the Board heard submissions on that issue (or that any of the parties disputed the Board's jurisdiction to do so). Moreover, that decision is obviously not authority for the Board having jurisdiction to do so, as the Board declined to order damages against the individual employees and, accordingly, did not have to decide whether or not it would have jurisdiction to do so in grievance referral proceedings.

18. The award in *Re United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, etc., Local 800, and Bennett & Wright Contractors Ltd.* (1969), 20 L.A.C. 187 (Godin), is also of no assistance in deciding the instant case. In declining to award damages against individual employees for engaging in an unlawful strike, the award in that case appears to suggest that such damages might have been available had the union not been found liable for the employer's losses. However, that case is distinguishable from the present case as the arbitration clause contained in the applicable collective agreement expressly gave the arbitration board "the full authority to order ... any employee or the employees ... [to] do anything or pay any sum by way of damages which the Board deem just." Thus, in that case, the collective agreement specifically empowered the arbitration board to award damages against an employee. In the instant case, the Collective Agreement contains no such provision. Moreover, the award is certainly not authority for the general availability of damages, through arbitration, against individual employees, as no such damages were awarded in that case in spite of the presence of that empowering provision in the collective agreement.

19. In File No. 1446-88-G, Nicholls-Radke Limited referred the following grievance to the Board for determination:

Nicholls-Radtke Limited grieves that the U.A. Local 46, through its Business Representative, Bill Weatherup, and Bill Weatherup in his personal capacity has breached articles 10, 13.2 and 14.1 of the collective bargaining agreement by:

1. directing employees of Nicholls-Radtke on the Union Gas Greenbelt Compressor station job

where employee [sic] have been working 7:00 a.m. to 5:00 p.m., 6 days a week, to work only from 8:00 a.m. to 4:00 p.m., Monday to Friday.

2. coercing employees of Nicholls-Radtke Limited at the Union Gas Greenbelt Compressor job to walk off the job two hours early on August 15 to attend a Union meeting.

3. encouraging employees of Nicholls-Radtke Limited, both at and following a meeting on or about July 27, 1988, to take job action in an attempt to force Nicholls-Radtke to pay the same premium paid to the fitters on the job site, as was by [sic] paid to the welders.

4. attending at a Nicholls-Radtke job site, without initially reporting to the Nicholls-Radtke Superintendent. In addition, the Business agent, Bill Weatherup, has breached article 17 of the collective agreement by attempting to resolve a difference in the application of the agreement through economic pressure rather than through proper procedures set out in the collective bargaining agreement.

Nicholls-Radtke seeks as a remedy to the above grievance:

1. a declaration that Bill Weatherup has breached the collective agreement as alleged;
2. damages from Bill Weatherup, incurred by Nicholls-Radtke as a result of the delay in work resulting from his breach of the collective agreement;
3. a direction to Bill Weatherup that he is to resolve differences under the collective agreement in accordance with the grievance arbitration procedure therein contained.
4. a direction to Bill Weatherup that he is to report directly to the grievor's superintendent upon arrival at the site.

In an unreported decision dated May 31, 1991 regarding that referral, another referral, and a section 91 (then section 89) complaint, the Board wrote, in part, as follows:

5. The Board heard extensive evidence with respect to each of the three matters. As was referred to earlier, the three matters were heard together notwithstanding certain preliminary objections which were raised by counsel for Local 46 and Bill Weatherup. In a letter to the Board dated September 28, 1988, counsel raised an objection that the grievance in 1446-88-G was inarbitrable under the collective agreement binding upon the parties. It was the position of counsel for Local 46 and Bill Weatherup that there was no legal basis for the assertion of Nicholls' claim for relief against Bill Weatherup. Counsel also noted that no relief had been claimed in the grievance against Local 46. These points were apparently subsequently raised again by counsel for Local 46 and Bill Weatherup in a communication to counsel for Nicholls. The only recorded response to this before the Board consisted of a reference in argument by counsel for Nicholls after the evidence had been adduced that he was asking for relief in the complaint under section 89 and the referral under section 124 and *vice versa*.

• • • •

8. With regard to the referral to arbitration in File 1446-88-G, the Board notes that the only relief sought is against Bill Weatherup and not against Local 46. The Board has referred to the objections of counsel for Local 46 and Bill Weatherup earlier in this decision. The Board agrees that the procedure under section 124 contemplates that the proper parties to a grievance referral are the employer and the trade union and that Bill Weatherup is not a proper party to a grievance and referral under section 124. See *J. G. Rivard Limited*, [1976] OLRB Rep. Sept. 540. Moreover, there is nothing in the *Labour Relations Act* or the provisions of the Ontario Provincial Collective Agreement 1988-1990 between the Mechanical Contractors Association Trades Council and the Ontario Pipe Trades Council referred to in the referral which confers any such status by or with respect to Bill Weatherup. Nicholls was put on notice and did not respond to the preliminary objection until the evidence was in before the Board. Local 46 and Bill Weatherup are entitled to rely on the referral as framed and it is unfair and unreasonable for counsel

for Nicholls to respond to the issue at the stage which he did. The referral under section 124 is dismissed.

As noted by applicant's counsel, that case is distinguishable from the instant case in that, unlike Mr. Cord, Mr. Weatherup was not an employee and was, therefore, not bound by the collective agreement.

20. In *Re Ontario Produce Co. and Teamsters Union, Local 419* (1986), 26 L.A.C. (3d) 159 (O'Shea), the employer suffered a loss of approximately \$4,200 as a result of an unlawful strike. No damages were claimed against the union because the union steward had not participated in the strike and the union business agent had done everything he could to resolve it. However, the company filed a grievance against forty-one employees who had engaged in the strike, claiming damages and requesting the issuance of a warning (to be entered on each employee's individual employment record) that any further conduct of that nature would result in discharge. After finding that he had no right under the provisions of the collective agreement to impose a disciplinary penalty where no disciplinary action had been taken by the company, the arbitrator reached the following conclusion (at page 167) in respect of the company's claim for damages:

While the company might have claimed damages against the union as a party to the collective agreement, the company (for a very valid reason) elected not to do so. Since the individual employees are not parties to the collective agreement even though they are bound by the provisions contained in the collective agreement, the company is not entitled under the collective agreement to claim damages against the employees in a grievance.

21. Thus, the arbitral jurisprudence not only provides no precedent for the relief which EPSCA seeks to have the Board award against Mr. Cord in the instant case, but also tends to suggest that such relief will not generally, if ever, be available through grievance arbitration proceedings. However, in the circumstances of the instant case we find it unnecessary (and inappropriate) to comment upon the validity of that jurisprudence, for even if we assume (without deciding) that the Board could, in proceedings under section 126 of the act, grant such relief if so empowered by the provisions of the applicable collective agreement, we are not in a position to do so in respect of this grievance because nothing in the Collective Agreement between EPSCA and the Council gives the Board the power to award damages against an employee for improperly claiming or receiving room and board allowance. Accordingly, EPSCA's request for an award of damages against Mr. Cord is hereby dismissed.

22. The only remaining issue is whether declaratory relief is available to the applicant in this case. Arbitrators have generally declined to conclude that their power to grant a remedy is precluded by the absence of a specific remedial request in a grievance or a referral to arbitration (see Brown and Beatty, *Canadian Labour Arbitration* (3rd Ed.) at paragraph 2:1400). Moreover, we are persuaded that a request for a declaration is implicit in the first paragraph of the grievance, as a finding that EPSCA is correct in its assertion that "James Cord has violated Article 19 of the Master Portion of the EPSCA/OATC Collective Agreement by improperly claiming and receiving Room and Board Allowance" would, in effect, amount to a declaration thereof for all practical purposes.

23. On the basis of the above-quoted statement of facts and the exhibits referred to therein (which, as noted above, are undisputed for purposes of these proceedings), it is abundantly clear that James Cord improperly claimed and received Room and Board Allowance totalling \$11,650 to which he was not entitled under Article 19 of the Master Portion of the Collective Agreement, by misrepresenting to Ontario Hydro that his "regular residence" (within the meaning of Article 19) was in St. Catharines, when it was actually in Sarnia at all material times. Accordingly, the Board hereby so declares.

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**4033-91-R Michael Porter, Applicant v. The International Brotherhood of Electrical Workers, The IBEW Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 804, Respondents v. Fluker Electrical Mechanical Contractors, Division of H. Fluker Consultants Inc., Intervener**

**Construction Industry - Termination - Board considering termination application in circumstance where at all material times there has been, and for the foreseeable future there is likely to be, only one employee in the bargaining unit - Board observing that it makes no sense to send Board Officer to Owen Sound, with ballot box, to receive one ballot - Parties agreeing that Board send applicant a ballot in the usual form asking him whether he wishes to continue to be represented by the union - Applicant to return ballot to Board by registered mail on specified date**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

**APPEARANCES:** *Elizabeth Forster* and *Michael Porter* for the applicant; *Bernard Fishbein* for the respondents; *Stewart D. Saxe* and *Nancy-Jo Gray* for the intervener.

**DECISION OF THE BOARD;** April 21, 1992

1. This is an application for termination of the bargaining rights which the respondent union currently holds for a bargaining unit framed as follows:

all electricians and electricians' apprentices employed by the intervener in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

2. A hearing in this matter was held, in Toronto, on Thursday, April 16, 1992. All parties appeared and were represented by counsel. All parties agreed that the union's right to continue to represent the employees (as engaged from time to time) in the above-noted bargaining unit, should be determined by a representation vote. That is the procedure contemplated by section 58(3) of the Act, and the procedure which all parties agree should be employed here.

3. The unusual feature of this case is that at all material times there has been, and for the foreseeable future there is likely to be only one employee in the bargaining unit: Mr. Porter, the applicant. It would make no sense to trigger the usual mechanics of a representation vote (notices, scrutineers, a ballot box supervised by a Board Officer at a "neutral" location, etc.). There is, in this case, only one individual whose wishes must be canvassed, and it makes no sense to send a Board Officer to Owen Sound, with a ballot box, to receive his one ballot.

4. Accordingly, the parties are all agreed that the Board will send Mr. Porter a ballot, in the usual form, asking him to indicate whether or not he wishes to continue to be represented by the respondent union. Mr. Porter will return that ballot *BY REGISTERED MAIL ON APRIL 30, 1992*. That is the date that the Board hereby directs that the representation vote will be taken, and *that is the date upon which Mr. Porter must mark his ballot and send it to the Board by registered mail*. Upon receipt of that ballot, the Board will deal with this application in accordance with Mr. Porter's wishes.

5. The Board notes, "for the record", that all parties, by their counsel, are agreed to this procedure. The trade union agrees that the employer has scheduled Mr. Porter to work in the bargaining unit on this day, and neither this procedure nor the date selected will be the subject of any

unfair labour practice complaint. It also follows, that if Mr. Porter is to mark his ballot and mail it by registered mail, some accommodation for this purpose will have to be made for him to do so on April 30, 1992.

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**2920-90-R; 3054-90-U; 3420-90-U Amalgamated Clothing and Textile Workers Union, Applicant v. Georgian Industries Inc., Respondent v. Group of Employees, Objectors; Amalgamated Clothing and Textile Workers Union, Complainant v. Georgian Industries Inc., Respondent**

**Certification - Practice and Procedure - Reconsideration - Board hearing certification application and two unfair labour practice complaints together - Board ruling that it would first hear evidence concerning challenges to the list and issue a decision on those challenges before inquiring into voluntariness of petition and unfair labour practice complaints - Board deciding that three individuals should be included on the list and then beginning to hear evidence concerning the petition and complaints - Union seeking reconsideration on the ground that evidence elicited in relation to the unfair labour practice complaint contradicts findings of Board in its decision on the list - Board unwilling to reconsider its decision based on evidence which came out subsequent to that decision which was readily available and could have been called by the union, but was not - Request for reconsideration dismissed**

**BEFORE:** *Janice Johnston*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

**APPEARANCES:** *Dave Watson* and *John Stevens* for the applicant/complainant; *Alan Whyte* and *Ben Ball* for the respondent; *C. J. Abbass* and *Penny Francis* for the objectors.

**DECISION OF JANICE JOHNSTON, VICE-CHAIR AND BOARD MEMBER, G. O. SHAMANSKI; April 3, 1992**

1. The applicant/complainant, the Amalgamated Clothing and Textile Workers Union (the "union") has requested reconsideration of the Board's decision dated September 5, 1991.

2. This request for reconsideration arises in the following context. The three Board files consist of an Application for Certification and two unfair labour practice complaints filed under section 91 [formerly section 89] of the *Labour Relations Act* (the "Act"). A petition opposing the certification of the union was filed and there were numerous challenges to the list of employees submitted by the employer to the Board. On the first day of hearing scheduled to deal with these matters, after hearing the submissions of the parties, the Board outlined the manner in which it would proceed to deal with the issues in dispute. We directed that all three matters were to be dealt with together in one proceeding. The Board ruled it would hear evidence concerning the challenges to the list and issue a decision on those challenges, before inquiring into the voluntariness of the petition and the section 91 complaints. The parties were directed to call their evidence accordingly. No one objected to this procedure. At the time of the ruling, the applicant was challenging four persons and the objecting employees were challenging seven. In the course of the proceedings the parties were able to reach agreement on all of the challenges save for three. The union still continued to challenge the inclusion on the list of Marlene Valender, Susan Truax and

Kathy MacFarlane, all of whom held the position of Bindery Supervisor, on the basis that they exercise managerial functions. The majority of the Board issued its decision on September 5, 1991, after nine days of hearings concerning the challenges, in which it found that these three individuals should be included on the list as they did not exercise managerial functions. Board Member Armstrong dissented from this decision, as he would have reached the opposite conclusion. It is this decision which is subject to the reconsideration request.

3. In accordance with the procedure outlined on the first day, the Board next turned to hear evidence concerning the voluntariness of the petition and the section 91 complaints. On December 4, 1991, the date the hearing on these issues commenced, the respondent, Georgian Industries Inc. (the "employer" or the "company") called Marlene Valender as a witness in relation to one of the section 91 complaints. The union cross-examined Ms. Valender extensively concerning her duties and responsibilities. The union now takes the position in its request for reconsideration that this evidence contradicts findings of fact in the September 5, 1991 decision.

4. The applicant/complainant's request for reconsideration reads in part as follows:

...

4. These Board files comprise an application for certification and complaints under section 89 [now 91] of the *Labour Relations Act* (hereinafter referred to as the "Act"). A petition has also been filed. All Board files were consolidated. The Board determined at the outset of the hearings into these matters that it would deal with the challenges to the list prior to conducting an inquiry into the voluntariness of the petition. However, the Board determined the "[a]ny evidence called in relation to any one file or issue would be relevant to and considered by the Board in dealing with the other matters before it" (Decision at paragraph 6).

11. Pursuant to section 106(1) for the Act, the union requests that the Board reconsider and vary the Decision of the Majority. In particular, the union asks that the Board reconsider and vary the Majority's finding that Marlene Valender, Susan Truax and Kathy MacFarlane (the "Bindery Supervisors") did not exercise managerial functions such as to cause their exclusion from the list. The union asks the Board to substitute a finding that the Bindery Supervisors do exercise managerial functions and should be excluded from the list pursuant to section 1(3)(b) of the Act.

12. The basis for the union's request for reconsideration is the evidence given by Marlene Valender on December 4 and 5, 1991.

13. It is the union's position that the facts adduced from this witness contradict findings of fact made by the Majority in its Decision without the benefit of any evidence from a Bindery Supervisor. Furthermore, these now-contradicted findings of fact were central to the ultimate conclusion arrived at in the Decision, namely, that the Bindery Supervisors did not exercise managerial functions such as to cause their exclusion from the list.

...

35. In the face of these newly revealed contradictions to previous findings made by the Majority, it is submitted that the Board ought to reconsider and vary its Decision.

...

37. *John Entwistle Construction Limited*, [1979] OLRB Rep. No. 1096 is a commonly cited case on the section 106 power:

The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decision and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:



Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.

(paragraph 5)

38. It is only in the interests of justice to preserve the finality of a decision if that decision was made on the basis of a true account of the facts.

39. As the majority itself repeatedly noted in its Decision, the picture at the time of rendering the Decision was not a clear one. The Board now has before it a clear picture, and it is one which in the union's submission points to a and it is one which in the union's submission points to a different conclusion. To ignore the facts which have recently come to light would be to remain wilfully blind to the evidence.

40. The Board in the *Entwistle* case cautions against an inflexible application of the reconsideration power. Having recited the general rules regarding reconsideration requests, the Board in *Entwistle* goes on to note:

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decision, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. *While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly.* Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision.

(paragraph 5, emphasis added)

41. The union therefore requests that the Board reconsider and vary its Decision. The union submits that the Board should find on the basis of the evidence which has recently come to light that Bindery Supervisors exercise managerial functions and that the three challenged individuals should be excluded from the list.

In paragraphs 14 to 30 of its request for reconsideration the union sets out excerpts from Ms. Valender's evidence given on December 4 and 5, 1991, which it feels supports the conclusion that she should be excluded from the list pursuant to section 1(3)(b) of the Act.

5. The company filed submissions in response to the request for reconsideration. Counsel for the respondent takes the position that the Board's jurisprudence establishes two main tests which are utilized in addressing a request for reconsideration:

1. Does the request raise significant and important issues of Board policy (*John Entwistle Construction Limited* [1979] OLRB Rep. Nov. 1096).

2. Does the party making the request propose to adduce new evidence which could not have previously been obtained by reasonable diligence and furthermore, is the new evidence such that it would be practically conclusive, or would the granting of the reconsideration request allow a party to make representations or objections not already considered by the Board that he had no opportunity to raise previously (*Canadian Union of General Employees* [1975] OLRB Rep. Apr. 320).

In this case, there is clearly no significant or important issues of Board policy raised by the Union's request for reconsideration.

The second test is relied on by the Union in this matter, and therefore the application of this test to the facts of this case will be discussed in detail below.

#### CANADIAN UNION OF GENERAL EMPLOYEES TEST

The portions of the second test referred to above will be considered separately below.

##### A New Evidence

This portion of the test requires that the party making the request for reconsideration propose to adduce new evidence *which could not previously have been obtained by reasonable diligence*.

In its submissions, the Union advises that it relies on the evidence given by Marlene Valender in December 1991, after the challenges portion of this hearing was concluded and decided by the Board.

The Respondent submits that the Union could have easily put Mrs. Valender's evidence before the Board during the challenges portion of the hearing. In discussing the procedure to be followed in this hearing (which called for the determination of the challenges first, followed by the portion of the hearing dealing with the voluntariness of the petition and the Section 89 complaints) the Union made it clear that the onus to call evidence to support each party's challenges lay on the party making the challenge. In this case, it was the Union that challenged the three Bindery Supervisors in question, not the group of objecting employees. It was open to the Union to subpoena one of the Bindery Supervisors in question to come to the Board during the challenges portion of the hearing in order to give evidence on the authority of the supervisors in relation to employee evaluations, dispensing of overtime, etc. However, the Union failed to avail itself of this opportunity and therefore cannot now be heard to argue that the evidence before the Board during the challenges portion of the hearing was incomplete.

The Respondent reminds the Board that during the course of the challenges portion of the hearing, counsel for the Respondent inquired of the Board directly as to whether or not the Board wished to hear from the employees occupying the positions in question. The Board indicated that it was up to the parties to call whatever evidence was felt to be appropriate.

In these circumstances, the Respondent submits that there was no obligation, legal or otherwise, for the Respondent to have called any of the Bindery Supervisors as witnesses during the challenges portion of the hearing.

Having not called all of the evidence available to it, the Union cannot now seek to re-open the challenges portion of the hearing when that part of the case is now decided, and the focus of the Board's inquiry is entirely different (as it was at the time of Mrs. Valender's evidence being given in December 1991).

6. Counsel then goes on to outline what he refers to as the second part of the "new evidence" test. In his submission, the new evidence must be practically conclusive or so strong and convincing that it would cause the Board to reverse its previous decision. In his opinion, the evidence heard by the Board on December 4 and 5, 1991 from Ms. Valender does not meet this test.

7. In response to the union's argument concerning the effect of consolidating the files, the company responds as follows:

• • •

The Union refers to the Board's Decision that "any evidence called in relation to any one file or issue would be relevant to and considered by the Board in dealing with the other matters before it."

The Board also determined that it would decide the question of the challenges prior to determining the voluntariness of the petition and ruling on the Section 89 complaints. Accordingly, it was clear to all concerned (the Board, the Union, the Respondent and the objecting employees)

that there were two discreet portions of the hearing; the first to deal with the challenges; the second to deal with the petition and the Section 89 complaints.

In the Respondent's submission, the quote set out above does not mean that a party to these proceedings can attempt to re-open decisions made by the Board in previous portions of the hearing (which is what the Union now seeks to do). The above mentioned quote does mean, for example, that the Board can consider evidence heard during the challenges portion of the hearing (for example, the evidence of Maryanne Reid) in considering the Section 89 complaint which involves Ms. Reid.

The company then goes on to respond to specific arguments raised by the union concerning Ms. Valender's evidence and its effect on the Board's decision.

7. Counsel for the objecting employees also filed submissions in response to the union's request for reconsideration. They read as follows:

On behalf of the Group of Objecting Employees, it is submitted that this request should be denied for the following reasons:

1. The union wishes to adduce evidence which could previously have been obtained by reasonable diligence.

Ms. Valender could have been called by the union to give evidence as a witness for the union. The only limitation which the union have faced is that they would not have been able to cross examine their own witness without first having her declared a hostile witness.

2. The evidence which the union wishes to adduce would not be conclusive.
3. The union had full opportunity to make and did make representation prior to the Board rendering its decision. This application raises no new issues or arguments.
4. The Board has not made an obvious error in its decision.
5. This request does not raise significant and important issues of Board policy.

In order to avoid abuse of the reconsideration provisions and to bring some finality to its adjudicated decisions, this Board ought not to accede to the union's request for reconsideration.

9. In reply, counsel for the applicant made the following final submissions:

1. The Board has the power to exercise its reconsideration power "if it considers it advisable to do so" (section 108(1) *Labour Relations Act*). The Board's power to reconsider is not fettered by the tests described by counsel for the company at pages 3-5 of the company's submissions. Indeed, in *Coons Heating and Sheet Metal Limited*, [1978] OLRB Rep. June 525, the Board acceded to an employee's request for reconsideration of a decision to certify a trade union despite the fact that the evidence relied on in support of the reconsideration request could have been raised in a timely fashion prior to certification.
2. In any event, the evidence at issue in these proceedings has already been heard. It is irrelevant who led that evidence or at what stage of the proceedings the evidence was led. If the mandate of a quasi-judicial tribunal is to render a decision based on a true account of the facts, the tribunal cannot ignore evidence simply because it was elicited at one stage of the proceedings rather than another. This is especially true in this case, where the issues at the various stages of the proceedings are intertwined. For example, the status of the challenged individuals is important to the Board's determination of the voluntariness of the petition. The evidence of Mrs. Valender calls into serious doubt the earlier evidence relating to the duties and responsibilities of the challenged individuals and cannot be ignored as it relates to any one phase of the hearing.



• • •

4. The union reasserts that the evidence of Mrs. Valender of itself demonstrates conclusively that Bindery Supervisors exercise essentially discretionary functions which affect the employment status of bargaining unit employees.
5. In the alternative, the evidence of Mrs. Valender casts sufficient doubt on the reliability of the evidence on which the Board based its Decision so as to cause the Board to reopen the issue of the status of the Bindery Supervisors.

10. Under section 108 [formerly section 106] of the Act the Board has the discretion to reconsider any decision it has made. Section 108(1) reads as follows:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

11. Practice Note No. 17 and the Board's jurisprudence set out the basis upon which the Board exercises its discretion. Practice Note No. 17 states in part:

• • •

4. The Board has stated in *K-Mart Canada Limited (Peterborough)*, [1981] O.L.R.B. Rep. Feb. 185, at ¶4:

"To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132, (Ont. Div. Ct.)."

5. The Board has also stated in *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096 at ¶5:

"The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

"Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously."

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees case, supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision."

12. None of the parties are questioning that on the first day of hearing, after hearing submissions from the parties, the Board outlined the manner in which it would proceed to deal with the matters in dispute between the parties. It was then agreed that the union would proceed first with its evidence concerning its challenges, followed by the evidence of the objecting employees, with the evidence of the respondent being adduced last. Counsel for the respondent indicates correctly in his submissions that during the course of the challenges portion of the hearing "...counsel for the respondent inquired of the Board directly as to whether or not the Board wished to hear from the employees occupying the positions in question. The Board indicated that it was up to the parties to call whatever evidence was felt to be appropriate." Counsel for the union took the position that the decision to call evidence to prove its position, rested with the party putting forward the challenge.

13. It was clear that the hearing would essentially be divided into two segments. After having given all of the parties an opportunity to call evidence and make submissions on the issue of the challenges to the list, the Board rendered a written decision. The union, was aware that each party was to call the evidence it felt was appropriate on the issue of whether the incumbents in the position of Bindery Supervisor exercised managerial functions and should therefore be excluded from the list of employees. None of the incumbents in the Bindery Supervisor position were called to testify. There is no suggestion that they could not have been called. It was the union's decision not to call one of the incumbents in the Bindery Supervisor position. The Board did not therefore have the benefit of that evidence at the appropriate time, when that issue was being litigated and when the Board had to make its decision on that issue. A final decision based on the extensive evidence before us, was given after having given all parties the full opportunity to present their case.

14. Before a party can put new evidence before the Board as part of a request for reconsideration, it must establish that this new evidence "was not previously available to them by the exercise of due diligence". If it were otherwise, there would be no finality or end to Board proceedings. The union has not met that test in this case. The evidence it seeks to have the Board consider was readily available at the time the issue was being litigated. There is no reason why the union could not have called that evidence at the appropriate time. Counsel for the union takes the position that "... the picture at the time of rendering the decision was not a clear one. The Board now has before it a clear picture, and it is one which in the union's submission points to a different conclusion. To ignore the facts which have recently come to light would be to remain wilfully blind to the evidence". With respect, whether or not the evidence may point to a different conclusion (we are not necessarily convinced it does) is not the real issue. The union could have called this evidence at the appropriate time and chose not to. The Board's jurisprudence makes it clear that it will not undermine the finality of its decisions except in limited circumstances. In this case, it would be prejudicial to the other parties to accede to the union's request and would undermine the Board's process. At the outset, all the parties were clear that the Board would hear evidence and submissions and render a *final* decision on the challenges to the list before turning to the petition and section 91 complaint. The union now seeks to get around this. The union is asking the Board to reconsider its decision based on evidence which came out subsequent to that decision which was readily available and could have been called by the union, but was not.

15. While it is accurate to state that the Board consolidated the three files and indicated that “any evidence called in relation to any one file or issue would be relevant to and considered by the Board in dealing with the other matters before it”, this does not mean that after an issue has been decided, it can be re-opened continually. It means rather, that any evidence adduced in the early stages of the hearing with respect to the issues then being litigated, could be considered, if relevant, to other issues which are the subject of subsequent parts of the proceeding. The parties are not therefore required to recall evidence relevant to more than one of the issues. This procedure is not intended to create an opportunity to re-open issues the Board has already finally ruled upon or issued a decision on.

16. Counsel for the union referred the Board to *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525 and argued that the Board in that case acceded to a request for reconsideration despite the fact that the evidence in support of the reconsideration request could have been raised in a timely fashion prior to the original decision. The *Coons* case dealt with an application for certification in the construction industry. As permitted by the Act, section 104(4) [formerly section 102(14)], the Board in that case issued a certificate without a hearing. Subsequently the Board learned of employer participation in the selection of the union which caused it to revoke the certificate. While an employee of the company was aware of the employer interference he did not raise it with the Board prior to the initial issuance of the certificate. It was this evidence which caused the Board to reconsider its decision. In reaching this conclusion the Board stated:

...

22. It was contended by both counsel for CLAC and counsel for the respondent that any employer support of CLAC had been known all along to Mr. Richardson, and that it had been incumbent upon him to raise the matters he now complains of in timely fashion prior to the issuance of the certificate. The Board's general practice is, in fact, not to reconsider a decision or to entertain new evidence unless a party proposes to adduce evidence which it could not previously have obtained by the exercise of reasonable diligence. However, *having regard to the strict prohibition contained in section 12 of the Act against certifying trade unions which have received employer support*, and to the particular circumstances of this case - including the fact that Mr. Richardson was an employee acting at the relevant time at the behest of his employer - the Board is satisfied that it should exercise its discretion and reconsider its decision to certify CLAC.

[emphasis added]

17. The circumstances of the case before us bear little resemblance to the *Coons* case. In *Coons*, no hearing had been held whereas in our situation we rendered our decision after having afforded the parties, who are all represented by counsel, full opportunity to call evidence and make submissions to the Board. The *Coons* case is readily distinguishable from the case before us.

18. In *T. Eaton Company Limited*, [1985] OLRB Rep. Nov. 1683 the Board stated:

A proper response to the respondents' requests for reconsideration requires a brief review of the basis upon which the Board has always considered it appropriate to exercise the power granted it under section 106(1) to “reconsider any decision, order, direction, or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling”. That power must be read against the normal expectation in law, specifically included in the words of section 106(1) itself, that once a tribunal has reached and issued a decision on a matter that has been fully litigated before it, that decision is “final and conclusive” (subject, of course, to whatever avenues of review may properly lie to the Courts). Apart from wishing to exhaust section 106(1) as a preliminary to moving in the Courts, any party in receipt of a decision it deems unfavourable may feel perplexed by it, and may well experience an urge to re-state its case to the tribunal in the hope that the tribunal may yet “see the light”, from the party's point of view. A party on *either* side of any decision may also see in it language that it wished had been expressed other-



wise, either to make the decision perhaps a little more favourable to it, or to enable it to better judge for the future what the law, as expressed in the decision requires its conduct to be. But if one party's "success" in litigation is to be fairly protected, and a reasonable expectation of finality to decisions is to be fostered in the community, a tribunal must resist, except on the most exceptional of grounds, an invitation to re-state, explain, or otherwise attempt to improve the language it has ultimately settled upon in issuing its final decision. As the Board stated in *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096 at 5:

"The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

'Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.'

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board."

And as the Board has also stated, most recently, as the complainant notes, in *Sears Canada Limited*, OLRB File #1305-84-R, unreported, June 25, 1985 at para. 8:

"The Board will not permit its authority to reconsider decisions to become a forum for rearguing the merits or submissions on matters already dealt with by the Board."

19. For the reasons expressed, we do not feel it is appropriate to exercise our discretion to reconsider. The request for reconsideration is accordingly dismissed.

#### **DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG; April 3, 1992**

1. The respondent in this application for reconsideration argues that the evidence the applicant is relying on was available at the time the original decision was made. The respondent argues that the failure to adduce that evidence lies with the applicant. The respondent states that at the time the lists were in dispute it requested of the Board whether it wanted to hear from the three individuals in dispute. The Board at the time indicated that it was up to the parties to adduce the evidence they felt was appropriate. The respondents position is that the applicant could have adduced the evidence it purports to rely on at that time and the applicant cannot now use that evidence to support an application for reconsideration as it is not "new" evidence.

2. My response is two-fold. First I would refer to my original dissent at the risk of being heard to say "I told you so". I do this not meaning to spite my colleagues but merely to emphasize that haste makes waste. This leads to my second and somewhat more considered response of a panel dealing with another matter and had to respond to a complainant's request that the Board had an obligation to bring forward all the witnesses this complaint wanted to call, ie. subpoena and pay the conduct money. This request was turned down but in the course of arguing the complainant relied on the Board's practice of paying the conduct or attendance money to witnesses with respect to determining the appropriate bargaining unit. The difference between the two situations is that in a complaint under section 91(4) [previously section 89(4)] the Board has broad remedial powers which it may exercise or not at its discretion. Section 91(5) [previously section 89(5)] assign the burden of proof. The relevance of this to the case before this panel is that section 6(1) of the

Act does not grant a discretionary power to the Board but rather assigns a positive, statutory obligation. In the words of the section "subject to subsection (2), upon an application for certification, the Board *shall* determine the unit of employees that is appropriate for collective bargaining. Witnesses in a certification application are in effect the Board's own witnesses relevant to the determination the Legislature has directed be made by the Board. That was why in those cases the Board pays the conduct or appearance money.

3. As was the case here, on a certification application as part of its determination as to the appropriateness of the bargaining unit the Board as a preliminary step must arrive at a list of employees. The Board's process encourages the agreement of the parties on this issue but as is the case here disputes often arise. One of the sources of these disputes is section 1(3)(b) of the Act which excludes a person "who in the opinion of the Board, exercises managerial functions..." from the definition of employee. This section grants the discretion to the Board to determine whether a person is managerially excluded or not. The determination when made in the context of a certification application is part of the positive statutory obligation imposed upon the Board to fashion an appropriate bargaining unit. A bargaining unit that includes persons who in fact perform a managerial function cannot be appropriate by virtue of section 1(3)(b).

4. If there was a failure to adduce appropriate evidence at the stage of determining the employee lists it was as a result of the Board failing to inquire sufficiently as to the functions and responsibilities of the person in dispute. This failure is very much inadvertent but nevertheless a failure by the Board to determine an appropriate bargaining unit as directed by the Legislature. Where evidence subsequently comes before the Board which would lead the Board to the opinion that a person or persons previously included in a bargaining unit in fact exercises managerial functions then the failure to adduce that evidence cannot be laid at the feet of any of the parties so as to create a bar to an application for reconsideration. Once the evidence is before the Board, no matter when or by whom, the Board must reconsider its decision with respect to the employee lists as part of its positive statutory obligation to determine an appropriate bargaining unit.

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**2813-90-U; 2918-90-R** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Complainant v. Havlik Technologies Inc. (Williams Machines Division), Respondent; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Havlik Technologies Inc.**, Respondent v. Group of Employees, Objectors

Certification - Discharge - Discharge for Union Activity - Membership Evidence - Petition - Unfair Labour Practice - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for purposes of Board's assessment under section 7 of the Act - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing

**BEFORE:** *Judith McCormack*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

**APPEARANCES:** *Michelle McPhee* and *Craig Grant* for the applicant/complainant; *Ian S. Campbell*, *David M. Gee*, *Dainis Asaris* and *Kathleen Nolan* for Havlik Technologies Inc.; *Terence J. Billo*, *Nyle Nussli*, *Paul Davidson* and *Jeff Kelly* for the objectors.

**DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK;**  
April 6, 1992

1. This is an application for certification which was heard together with a complaint under section 91 [formerly section 89] of the *Labour Relations Act*.

2. We find that the applicant is a trade union within the meaning of section 1(1) [formerly section 1(1)(p)] of the *Labour Relations Act*.

3. On February 15, 1991 a differently constituted panel of the Board made a number of preliminary findings in this matter, including the description of the unit of employees appropriate for collective bargaining. At that time there was a dispute with respect to the status of three employees, and a Board officer was appointed to investigate and report back on that matter. Subsequently, however, the applicant and respondent were able to settle this matter and as a result, it is not necessary for us to address it.

4. In support of its application for certification, the applicant filed documentary evidence showing that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 31, 1991, the terminal date fixed for this application and the date which the Board determines under section 105(2)(j) [formerly section 103(2)(j)] of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The form and contents of the applicant's documentary evidence of membership were consistent with the requirements of section 1(1)(1) of the Act and this evidence, standing by itself, demonstrated that the union had a level of membership support in excess of that required by section 7(2) of the Act for certification without a representation vote.

5. However, three statements of desire were also filed with the Board in a timely manner which contained the names of employees and indicated their wish to oppose the certification of the applicant union. These petitions included the names of a number of individuals who had previously signed membership cards, making it advisable for the Board to inquire into the circumstances surrounding their origination, preparation and circulation. If the signatures represented a voluntary change of heart on the part of the people who signed membership cards, normally these petitions would raise sufficient doubt about the continuing wishes of employees to cause the Board to exercise its discretion to order a representation vote.

6. Subsequent to February 15, 1991 the employer filed a number of allegations with respect to the collection of membership evidence. As a result, the Board heard evidence with respect to the applicant's section 91 complaint, the voluntariness of the three petitions, and the membership evidence allegations.

7. After the conclusion of the hearing, the Board issued the following decision:

1. A majority of the Board, Board Member Wightman reserving, finds that the respondent has violated sections 65 [formerly section 64] and 67 [formerly section 66] of the *Labour Relations Act* by terminating the employment of Michael Daly on January 25, 1991. As a result, we direct pursuant to section 91 [formerly section 89] that the respondent reinstate Michael Daly to the position he held prior to his termination, and that the respondent compensate Michael Daly for



any losses suffered as a result of the respondent's violation, together with interest in accordance with the Board's Practice Note #13.

2. With respect to the membership evidence allegations, we are not prepared either to dismiss the application for certification or to exercise our discretion to order a vote on this basis. In addition, we are not satisfied that the petitions represent the voluntary wishes of employees. Since the applicant otherwise meets the criteria for certification, a certificate will issue. Our reasons, our decisions on other matters and Board Member Wightman's decision will follow.

This decision contains those reasons and other findings.

8. The respondent is a manufacturer and finisher of highly engineered close tolerance metal components and assemblies, primarily for the aerospace and defense industries. It employs some 155 employees in its Williams Machines and Material Processing divisions which are located in separate areas of the same building complex in Cambridge, Ontario. In October of 1990, the applicant began an organizing drive with respect to both divisions. One of its first initiatives was to hold a union meeting at the applicant's local office on October 29, 1990. Among the employees who attended this meeting was Jeff Kelly, a spray painter in the Materials Processing division. Mr. Kelly heard "the whole scoop" as he described it, and signed a union card that night.

9. The respondent became aware of the organizing drive that same day. As a result, it issued a letter which foremen handed to employees on October 31st. This letter as a whole makes it clear that the respondent is opposed to unionization, and purports to set out a number of disadvantages for employees. It also includes the following paragraphs:

1. The union may promise you that by signing a union card, your job security will be guaranteed. The matter of job security, of course, is of the prime importance to both you and the company. Regardless of what a union promises you, job security cannot be guaranteed through promises or provisions in a collective agreement. Your job security and the company's well being depends upon your efforts and the company's ability to remain competitive in the market place.

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During the past five years, the employees have enjoyed regular wage increases, improvements in existing benefits and the introduction of new benefits. These improvements have been due in part to the company's ability to service its major customer, McDonnell Douglas, with consistent and timely delivery of product. We are confident that provided we continue to service our customer as we have done in the past, we will maintain this market share.

Dainis Asaris, the division manager for Williams Machines, told the Board that the purpose of this letter was to let employees know that the respondent was aware of the organizing attempt.

10. The following day, the respondent commenced negotiations with a shop committee representing employees in the two divisions. This shop committee had been in existence for some time and had negotiated some terms and conditions of employment in previous years. The respondent posted minutes of the first day of negotiations for employees' benefit, and also provided them with another letter at the end of that day. That letter sets out the changes in the employee benefit package between 1985 and 1991, and expresses the hope that this comparison will be helpful to employees in understanding the improvements that have resulted from negotiations with the shop committee. David Gee, president and chief executive officer of the respondent, told the Board that the purpose of this letter was to deliver the message that the shop committee was in place and that it was effective.

11. On November 2nd, the respondent handed out another letter to employees which also cites a number of objections to unionization. It includes the following paragraphs:

The matter of job security is, of course, of prime importance to both you and the Company. Regardless of what a union promises you, job security cannot be guaranteed through promises or provisions in a collective agreement. Your job security depends upon the Company's ability to continue to keep desirable business from its key customers at profitable prices.

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As to a grievance procedure, there is already a mechanism in place through which your concerns can be presented to and dealt with by the Company. The grievance procedure is simple and direct. It enables you to personally present your concerns either to your Shop Committee or directly to the Company's management. The Company has always tried to be receptive to, and act upon your concerns. As we have indicated, should a union be certified, the Company will not be able to deal directly with you with respect to either your personal or wider employment concerns.

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Remember, if 55% of the employees sign union cards, the union is entitled to be automatically certified without a vote. If by chance you have joined the union and have changed your mind, you may return your card - that is your choice.

(emphasis original)

Mr. Gee indicated that the references to job security in that letter were included because employees raised this as a concern in negotiations. When he was asked what the reference to employees returning their cards meant, he replied that he assumed that if employees changed their minds, they would have the option of returning their cards.

12. Sometime in early November, Mr. Asaris met with the plant manager and the foremen to instruct them on how to conduct themselves during the union campaign. The gist of his direction was that they were not to interfere or take sides, and that all communications with employees with respect to the campaign would be in writing. At one point he also provided some of them with pamphlets published by this Board.

13. Another negotiating meeting with the shop committee was held on November 7th. According to Mr. Asaris, seniority protection during lay-offs was a priority item for the committee. It was discussed first, he told the Board, because the shop committee was aware there might be upcoming layoffs, and they wanted to show employees that they had done something. The shop committee's position was that employees wanted seniority to be given greater weight. The respondent, on the other hand, was concerned that employees have the skill and ability to perform jobs in a lay-off situation, because the respondent was subject to an elaborate approval system by customers in which approval could be withdrawn, for example, if too much scrap was produced. On November 7th, the meeting concluded on the basis that the respondent would draft a lay-off and recall policy. Its first draft of that policy included the following paragraphs:

- (1) The Company is committed to job security. If any work force reduction becomes unavoidable the most junior employee affected will be laid off unless some special skill of the employee requires retention.
- (2) When a senior employee claims to have the ability to perform the work available in an equal or lower *classification* he will be allowed a maximum of 5 *working days* for orientation, provided he can substantiate previous work related experience in the Company (emphasis added).

14. It was then revised so that the second paragraph read as follows:

When a senior employee claims to have the ability to perform the work available at an equal or lower *wage grade* he will be allowed a maximum of 3 *working days* for orientation, provided he can substantiate previous work related experience in the company.

15. The respondent's job classification system sets out a number of numerical grades which are then attached to classifications. It appears that the wage grades are broader than the classifications since a wage grade may include more than one classification. The revised layoff and recall proposal was presented to the shop committee on November 8th and agreed upon at that time.

16. In the past, the package negotiated by the shop committee had been presented to employees for a vote at the conclusion of negotiations. This time however, the shop committee asked that the layoff and recall policy be implemented immediately and the respondent agreed. As a result, this policy was posted on November 9th. This was the first time that there had been early implementation of any term of the package.

17. On November 12th, 1990, the applicant issued an organizing bulletin which included comments casting doubt on the enforceability of any agreement between the respondent and unionized employees. In response, the respondent delivered a letter to employees indicating that the respondent had always honoured agreements with the shop committee and that employees had the ability to enforce an agreement, which was a contract in the eyes of the law.

18. Sometime during the first two weeks of November, Mr. Kelly changed his mind about wishing to belong to the union. Although this occurred after he had read the respondent's letter of November 2nd, he told the Board that the letter had no effect on him. He did, however, decide to pursue the matter by attempting to get his card back from the applicant. As a result, he and three other employees attended at the applicant's local office and asked Craig Grant, a staff organizer for the applicant, for their membership cards back. Mr. Grant responded that the cards had been sent to Toronto, and that if the employees came back in a few days, they could have their cards back. He then asked them why they were requesting their cards back, and they entered into a lengthy discussion. Mr. Kelly left before the discussion was over. Mr. Kelly did not re-attend at the applicant's office to get his card back. When asked why he had not done so, he said that he had not bothered because he had things to do, and that at the time he was working at two jobs.

19. On November 19th, at about 7:00 o'clock a.m., Mr. Kelly approached Sandy Sykes, the division manager for Material Processing, who had signed the copy of the letter of November 2nd given to Material Processing employees. By this time, he told the Board, he assumed that he was not going to receive his card back from the applicant although it is unclear why he had reached that conclusion. In any event, he told Mr. Sykes that he wanted to know how to "take his signature back" from the card. Mr. Sykes told him that he could not get involved, handed him one of the pamphlets published by this Board, and said that any information that he needed was in it. Mr. Kelly then reviewed the pamphlet, which includes a paragraph with respect to employees withdrawing support from a union by means of a statement of desire. At his first break at 9:15 a.m. Mr. Kelly testified that he called this Board from the plant using a pay phone, and charged the long distance rates to his home number. After work, he went home and drafted a petition which we will refer to as the first Material Processing petition. It contains the following preamble:



Nov. 19, 1990

Re- Ontario Labour Relations Board -

Statement of Desire

The following employees of Havlik Technologies would like to withdraw their support from the C.A.W. union. They feel that they were misled & that they acted hastily in signing the union cards before thinking about the severity of their decisions. Therefore, they wish to have their votes reneged. I must stress the fact that these following employees are acting on their own behalf [sic] without any pressure whatsoever from the management of this company.

("Signatures")

Thanx! [sic]

20. Mr. Kelly then collected the signatures of six other employees, two of them in his car or in the parking lot, and four on the respondent's premises. Two of these latter employees were at their work stations when Mr. Kelly approached them to sign the petition. At least one of those work stations was visible from a foreman's office where the plant manager sits during the day, although Mr. Kelly indicated that he was not there at the time he collected the signature in question.

21. Mr. Kelly also returned to the respondent's premises during the midnight shift for the purpose of collecting signatures. He approached approximately ten employees at their work stations to ask them to sign the petition, without success. This took approximately fifteen to twenty minutes. He agreed that on his way into the plant, he might have seen the shift foreman and greeted him, as the foreman was a friend of his. Mr. Kelly told the Board that everyone knew what he was doing because the Material Processing division was a small shop.

22. On November 21st, Mr. Kelly left work early to go to a doctor's appointment and mailed the first Materials Processing petition to the Board. At the time the Board received the petition, no application for certification had been filed. As a result of the wording on the petition, and the fact that no application for certification had been received, the Board came to the conclusion that Mr. Kelly wished to terminate already existing bargaining rights. As a result, the Board sent Mr. Kelly a package of information and forms in that regard. Mr. Kelly decided to do nothing at that point and put his petition away.

23. In late November or early December, Mr. Grant was handing out union leaflets at the entrance to the respondent's premises when Mr. Kelly approached him and asked him why he had not returned his card. At this point, there is a conflict in the evidence. Mr. Kelly told the Board that Mr. Grant refused to return his card, and said that Mr. Kelly would have to write up a statement of desire. Mr. Kelly then testified that he left, after Mr. Grant called him names and suggested an insulting course of action for him to pursue. At the time of this conversation, the plant manager for Material Processing and several other members of management were walking past.

24. Mr. Grant told the Board that when Mr. Kelly asked for his card back, he pointed out that Mr. Kelly had never returned to the applicant's office to get his card. He and Mr. Kelly then got into a debate on the merits of union representation. Finally, Mr. Grant said to Mr. Kelly that there was no point in the two of them carrying on like that, and that if he wanted his card back, he should come to the office and get it. He then told Mr. Kelly to leave him alone in fairly coarse terms.

25. Sometime in early December, the wage and benefit package negotiated with the shop

committee was presented to employees. Employees voted against it, and it was then amended. On December 11th, a second vote was held and the amended package was accepted. The resulting agreement was to be in effect from January 1, 1991 to December 31, 1992, and the respondent posted a notice to employees to this effect. There was no suggestion that this agreement constituted a bar to the present application.

26. On December 21st, the respondent held two meetings, one with employees in each division. This was not in itself unusual, as the respondent had met with employees in previous years before the Christmas and summer shutdowns. These meetings are not mandatory, as some employees are allowed to leave work early, but they are held during working hours and on December 21st between sixty and seventy-five per cent of employees attended. At that time, Mr. Gee outlined a number of market conditions, and certain aspects of the respondent's economic prospects. He complimented the shop committee for doing an excellent job in negotiations and reviewed the new wage and benefit package issue by issue. In this regard he described the following provisions in these terms:

- WILLIAMS  
MACHINES
- 1) A new layoff and recall policy based for the first time on seniority supported by the skill and ability to do the job.
  - 2) Clarification of disciplinary action to ensure fairness and avoid favouritism.
  - 3) A process to guarantee that there was a fair opportunity to review disciplinary action with the shop committees where there was employee concern.
  - ( 4) A process for the allocation of overtime on a fair basis.
  - (
  - (
  - ( 5) New summer hours language.
  - 6) A company commitment to prepare job classification definitions and requirements.
  - 7) Wage adjustment of 5.5% and 4.5% at a time when unemployment is at an all time high.
  - 8) Inflation protection for second year.
  - 9) One additional paid holiday - re weekly pay, majority supported holiday.
  - 10) Significant improvements to other benefits, dental, life insurance.

Mr. Gee also told employees that this was a legally binding agreement and pointed out to them that it was significant that they were able to negotiate this agreement directly without the influence of outside parties. At the conclusion of the meeting, he testified that he said as follows:

Finally, I am hopeful that we will be able to resolve the activities of some employees relative to representation. This situation is not helping us, as opportunities to bid on work are being negatively influenced because of uncertainty and concern in the minds of some of our customers.

The only thing that will guarantee all of us a healthy and prosperous new year is for all of us to move into 1991 with a spirit of co-operation and a commitment to doing the best job we can for our customers.

Several employees who testified for the applicant told the Board that Mr. Gee also made references to the possibility of the respondent's customers "double-sourcing" when he spoke of outside

representation. The gist of this was that customers for whom the respondent had been the sole supplier for work of this nature might obtain an additional supplier. The respondent's witnesses denied that Mr. Gee had said this.

27. On January 21st, 1991, the applicant filed its certification application with the Board. Notice of that application was received by the respondent on January 25th. The forms notifying employees of the application were posted at approximately 8:30 a.m. that day. Shortly after lunch, the respondent delivered another letter to each employee which included both the following paragraphs and a passage setting out the petition process:

3. If over 55% of you have signed cards, and objecting employees are not successful in petitioning the Labour Board, then there will be no vote nor will there be any further opportunity to discuss the representation issue. Do not under any circumstances be talked into signing union cards unless you are totally committed to changing your relationship with the company. No one knows what the outcome will be at this time. Your support of the union will definitely jeopardize any effort you, your fellow employees, or the company may choose to make in the coming weeks.

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One thing is sure - the decision you make will change your relationship with the company forever.

(emphasis original)

Mr. Gee explained to the Board that the reason for the inclusion of these paragraphs was because he wanted employees to understand that signing a union card was a serious and important decision.

28. On that same day, the respondent laid off Michael Daly, one of the union's inside organizers and a high profile union supporter. Mr. Daly was called to a meeting in the afternoon with Mr. Asaris, Hans Starz, the Williams Machines plant manager, Tony Babic, Mr. Daly's foreman, and Gary Lewington, a member of the shop committee. Mr. Asaris told Mr. Daly that the respondent had run out of work for the machine Mr. Daly was operating, and that he was being indefinitely laid off. The machine in question is a Mazak computer numerically controlled machining centre, one of a number of CNC machines utilized by the respondent. Mr. Daly replied that this was not right, and that he could run any machine in the place. He then asked "who do I bump?", apparently in reference to the respondent's new layoff policy. Mr. Asaris replied that the new policy did not recognize bumping. Rather, it recognized a senior person having demonstrated ability within the company. Mr. Asaris told the Board that he did not ask Mr. Daly which machines he could run, as Mr. Daly then started talking about suing the respondent. At some point early in the conversation, Mr. Daly turned to Mr. Lewington and said "you know what they are doing to me, start taking notes". Not surprisingly, Mr. Daly was upset by the layoff, and Mr. Asaris told him that because he was taking it badly, the respondent would pay him in lieu of notice and that he would have to leave immediately. Mr. Asaris told the Board that he thought Mr. Daly might be violent, and that he called Mr. Babic to escort him out. To be fair to Mr. Daly, there is little concrete evidence to support Mr. Asaris' speculation that he might be violent. Mr. Babic then went and had coffee with Mr. Daly in the cafeteria and accompanied him while he collected his tool box and left the plant. Mr. Grant called Mr. Asaris that afternoon and told him that the applicant would be filing a complaint to this Board with respect to Mr. Daly's layoff.

29. On January 24th, 1991, Paul Davidson and Nyle Nussli decided to circulate a petition in opposition to the union, which we will refer to as the Williams Machines petition. Mr. Davidson is a machinist and Mr. Nussli is the maintenance lead hand in the Williams Machines division. The applicant also alleges that Mr. Nussli was the acting foreman for maintenance employees from Feb-



ruary to November of 1990. On the morning of January 25th, after reading the Board's posted notice to employees with respect to the application for certification, Mr. Nussli called the Employment Standards Branch, this Board and a lawyer, Terence Billo, using the respondent's direct Toronto line. He made these calls from the maintenance foreman's office. That afternoon, he and Mr. Davidson left work early to keep an appointment that he had made with Mr. Billo, telling their superiors that they were leaving for personal business.

30. Among other things, Mr. Billo advised them that petition signatures should be collected off the respondent's premises and outside of working hours, if possible. However, Mr. Nussli and Mr. Davidson felt that this was not possible because of the number of employees involved. Between January 27th and January 30th, Mr. Nussli and Mr. Davidson collected some sixty-seven signatures, for the most part on the respondent's premises. The majority of these signatures were collected in a meeting held on January 28th in an unheated storage area which forms a passageway between the employee entrance to Williams Machines and the main shop floor. This storage area provides access from the employee parking lot to the adjacent maintenance and assembly areas, and to the main shop floor through a hall. The maintenance foreman's office is also adjacent to this area, although it is not within view as a result of its location within the maintenance area. Employees were notified of the meeting by word of mouth on the morning of January 28th, and some thirty-three employees collected in the storage area at lunch hour. A number of signatures were also collected when Mr. Davidson and Mr. Nussli returned to the plant after their working hours that evening. Mr. Davidson agreed that generally employees are not allowed on the respondent's premises when they are not on shift. Mr. Asaris told the Board that if employees come back to the premises after their shift is over, the respondent will speak to them, and ask them why they are in the plant, but that they are not generally disciplined. Mr. Davidson returned the petition to Mr. Billo on January 30th, who sent it to this Board.

31. Mr. Kelly was away from work on January 25th, but saw the Board's notice to employees posted when he returned to work on January 28th. During that day, he walked around the Material Processing division and spoke to a number of employees with respect to a petition. He agreed in cross-examination that he may also have shown employees the Board pamphlet that Mr. Sykes had given to him. The respondent's letter to employees of January 25th indicates that the respondent has copies of these pamphlets which employees may request. That evening, Mr. Kelly drafted the second Material Processing petition. Between January 29th and January 30th, Mr. Kelly collected the signatures of sixteen employees, again on the respondent's premises, for the most part at employees' work stations either during his working hours or theirs. Three of those employees were told by Mr. Kelly that he knew that they had signed individual petitions, and that he could save them a trip to the Board. Mr. Kelly told the Board that everyone he approached was concerned about either the union or the respondent seeing the petition.

32. Mr. Kelly then felt himself in need of some legal advice as to what to do with his two petitions. Coincidentally, he obtained the name of the same lawyer who was advising the Williams Machines petitioners from the telephone book. He told the Board that he had not spoken to anyone in the Williams Machines division in this regard. Mr. Kelly called Mr. Billo and was told that because the respondent was attempting to keep the two divisions separate for the purposes of the certification application, Mr. Billo could not act for Mr. Kelly at that time. Subsequently at the conclusion of the initial meeting with the Labour Relations Officer in these proceedings, it became clear that the two divisions would be considered together. As a result, on March 4th Mr. Kelly asked Mr. Billo to represent the Material Processing petitioners as well. He told the Board that he, Mr. Davidson and Mr. Nussli had agreed that they would be responsible for Mr. Billo's fee. All three of them indicated that they had either thought of or discussed with other employees taking

up a collection for those fees, but that other employees would not be required to contribute. Mr. Asaris told the Board that the respondent had not said that it would pay the petitioners' legal fees.

33. On the basis of this sequence of events, the applicant alleges that the layoff of Mr. Daly was a violation of the Act, and that the three petitions filed do not represent the voluntary wishes of employees.

34. We turn first to the section 91 complaint with respect to Mr. Daly's layoff, since it is alleged that this affects the voluntariness of the two petitions circulated subsequently. This is a matter to which section 91(5) applies. That section reads as follows:

91.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

35. In the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board set out its approach to allegations where section 91(5) applies:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer ... did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

36. Subsequently, the Board reiterated in *The Corporation of the City of London*, [1976] OLRB Rep. Jan. 990 that the anti-union motivation does not have to be the sole reason, or even the predominant reason for the activity complained of to violate the Act, so long as it is one of the reasons. Then in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board described the difficulties inherent in this kind of proceeding:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in



conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

37. In the instant case, we have examined the reasons advanced by the respondent for Mr. Daly's layoff not because we are adjudicating their reasonableness or their fairness, but because it is a step in the more complex process of ascertaining the employer's motivation. (*Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35).

38. The reason asserted by the respondent for Mr. Daly's layoff was that work had run out for the Mazak CNC machining centre that he was operating. As a result, Mark Crawford, who operated another Mazak CNC machining centre was transferred to another CNC machine, and Mr. Daly was laid off. Mr. Daly was laid off rather than being transferred, according to the respondent, because he did not have sufficient experience on other machines to displace another employee in accordance with the respondent's layoff and recall policy. Mr. Gee testified that lay-offs were originally contemplated in October of 1990 as a result of a particular contract coming to an end. However, the respondent was successful in obtaining other work which could be performed on the Mazak, and consequently work did not run out until the third week of January. At the same time Mr. Daly was laid off, the respondent recalled a labourer from layoff and laid off another labourer who was more junior. This had nothing to do with the lack of work, but was intended to bring the layoff situation into conformity with the policy the respondent had negotiated in November.

39. Mr. Gee told the Board that before deciding to lay off Mr. Daly, he had asked Mr. Asaris to bring a seniority list to his office and Mr. Gee had reviewed all employees with less seniority than Mr. Daly with a view to satisfying himself that there was no other work of an equal or lesser category that Mr. Daly could perform. Mr. Gee testified that when he reviewed the seniority list, he was satisfied with the information provided by Mr. Asaris. He himself did not have knowledge of the jobs performed by each of the people on the list. Mr. Asaris testified, however, that there were only three people whom he and Mr. Gee discussed specifically in reviewing the list. He also indicated that his own information with respect to Mr. Daly's experience on other machines came from Mr. Starz. Initially, he seemed to say that he had met with Mr. Starz to review Mr. Daly's experience in this regard. Subsequently, he told the Board that he had only met with Mr. Starz once, on January 15th, and that was only to tell him to go ahead with the plan to lay off Mr. Daly. In contrast, Mr. Starz testified that he was only told to lay off Mr. Daly on January 25th, the date he was actually laid off, and that Mr. Asaris did not ask him for any information about Mr. Daly's experience on other machines until that time. In re-examination, when a copy of Mr. Asaris' notes were placed in front of him, he appeared to recall an earlier meeting.

40. In fact even the respondent's own records show that Mr. Daly had operated a Leadwell CNC machining centre and a CNC lathe for a considerable period of time, and that he had performed work on a conventional milling machine and the Great Wall and Kuraki CNC machines for more limited periods of time. Mr. Babic also agreed in cross-examination that Mr. Daly had worked on the Cincinnati 5 axis single spindle profiler on at least one occasion. In addition, there were machines like the Ikeda CNC machine which Mr. Daly had not operated, but which had the same controls as the Great Wall and Kuraki machines. All of these machines were operated by employees at an equal or lower wage grade to that of Mr. Daly. There is no doubt that even on the basis of the respondent's evidence, there were employees junior to Mr. Daly working on some of those machines on the day that he was laid off.

41. Mr. Daly testified that in addition to his experience with the respondent, he had consid-



erable experience with CNC machines with other employers and that he had placed on the honour list for a course in CNC machine programming at Conestoga College, both of which are set out on his application for employment which Mr. Asaris testified he had reviewed at the time the decision was made to lay Mr. Daly off. In addition, Mr. Daly had received a bonus in 1990 from the respondent for innovations to a CNC machine program. He also received a merit increase on October 27th, 1990, together with a good performance evaluation.

42. The layoff and recall policy which the respondent asserted guided its decision in regard to Mr. Daly's layoff is set out previously. Under that policy, if a senior employee claims to have the ability to perform work available at an equal or lower wage grade, he is to be allowed a maximum of three working days for orientation, provided he can substantiate previous work related experience in the company. Thus even if we assume that Mr. Daly could not operate a Deckel milling machine for which a new employee was hired some ten days before Mr. Daly was laid off, and even if we assume that he could not operate any CNC machine which he had not previously operated, regardless of whether the controls were the same and in spite of the three days orientation permitted, and even if we assume that he could not perform the job of a labourer, there is simply no question that on the day Mr. Daly was laid off there were junior employees operating machines at wage grades equal to or lower than Mr. Daly's upon which he had previous experience to the knowledge of at least some members of management, and which information was available to them through the respondent's records had they wished to obtain it. While our task here is not to evaluate the correctness of the respondent's decision, the facts of the situation are so different from those upon which the respondent asserts its decision was based that this gap tends to undermine the respondent's credibility.

43. Counsel for the respondent argued that even if the respondent was mistaken about Mr. Daly's experience, this did not mean that the lay-off was improperly motivated. However, if Mr. Daly was laid off in error because of a lack of knowledge on the part of the respondent with respect to his experience, a number of questions arise about why the respondent's knowledge was so deficient. Having regard to the inconsistencies between the evidence of Mr. Gee, Mr. Asaris and Mr. Starz, it is clear that if the respondent made any attempt to ascertain Mr. Daly's experience at all, that attempt was very perfunctory. There is no question that information about Mr. Daly's previous experience was available to the respondent at the time either through the respondent's records, Mr. Daly's foreman, or Mr. Daly himself. Indeed, even when Mr. Daly raised the fact that he could operate other machines at the time he was laid off, the respondent declined to inquire further. In other words, the evidence is more consistent with the conclusion that the respondent was not particularly interested in whether Mr. Daly had experience operating other machines. This is significant given the critical role that the respondent asserted this factor played in the respondent's decision. In addition, the respondent's casual approach to its layoff and recall policy with respect to Mr. Daly is thrown into sharper focus by the other layoff on January 25th, which the respondent explained was for the purposes of bringing the layoff situation into conformity with the policy.

44. The respondent's witnesses appeared to suggest in their evidence that for Mr. Daly to qualify under the policy, it was not sufficient that he have experience on the same type of machine he had previously operated, but that that experience had to have been on the exact same machine. In addition, the respondent's witnesses seemed to take the position that he had to have previously performed all possible functions on that machine, and worked on all possible parts made on that machine. This interpretation is in such stark contrast to the plain wording of the policy which refers only to "previous work related experience in the company" and provides for a three day orientation, that it is simply not credible. In addition, the respondent's assertion that the second draft of the layoff and recall policy actually narrowed the range within which Mr. Daly could displace

another employee is at odds with the respondent's own wage and classification structure. Moreover, given the relative sophistication of the respondent's approach to the union campaign, it is difficult to conclude that its handling of Mr. Daly's layoff was prompted by misunderstanding.

45. Our concerns about the lay-off are heightened by the manner of the layoff. Mr. Gee indicated that the final decision to lay off Mr. Daly had been made on January 15th and that instructions were given at that time to start the paper work in this regard. Mr. Asaris told the Board that Mr. Starz had been the one to provide those instructions to the personnel office. In contrast, Mr. Starz told the Board that this was Mr. Asaris' job. The notice of layoff and the record of employment that were placed before the Board are both dated January 25th. Although the notice is described as a notice of layoff, the text reads as follows:

Due to a reduction in the workload, your services with this company will be terminated as of January 25th, 1991.

There is no mention of any possibility of recall at that point. Similarly, the record of employment provides a spot for an expected date of recall. This has been left blank. There are two other boxes, one which says "unknown" and the other which says "not returning". The respondent indicated that Mr. Daly was not returning, rather than checking the box which indicated that his recall date was unknown. This is at odds with the respondent's evidence to the effect that Mr. Daly would be recalled if there was work available, and was not satisfactorily explained.

46. The applicant and the respondent both led evidence with respect to a series of incidents involving Mr. Daly and other members of management. In final argument, the applicant clarified that it was not alleging that each of these instances were violations of the Act, but only that they indicated that the respondent was aware of Mr. Daly's support for the applicant. It is not necessary for us to review each of those incidents in detail and make findings where the evidence of the applicant and the respondent conflicts. This is because even if we accept the evidence of the respondent with respect to these incidents, and even if we accept that the respondent was not aware that Mr. Daly was one of the applicant's employee organizers, the respondent's own evidence clearly indicates that it was aware that Mr. Daly was a high profile union supporter who publicly displayed his allegiance.

47. Looking at the evidence as a whole, including the weakness of the respondent's reasons for not moving Mr. Daly to another machine, the timing of the layoff, and the fact that Mr. Daly was a high profile union supporter, we are not satisfied that the respondent's reasons for laying off Mr. Daly were entirely free of improper motivation. As a result, we found that the respondent violated section 65 and section 67 of the *Labour Relations Act* and ordered that the respondent reinstate Mr. Daly with compensation.

48. Both parties led evidence with respect to events subsequent to Mr. Daly's layoff. It was unclear whether this was in aid of their positions with respect to the propriety of the layoff, or whether it was directed to the appropriate remedy, or both. In any event, we were satisfied that the events subsequent to Mr. Daly's layoff do not point to the proposition that he was properly laid off; rather they suggest the contrary. Although we do not find it necessary to rely on that evidence in coming to our conclusion, we note that the evidence with respect to the use of Mr. Daly's machine subsequent to his layoff on an aerospace prototype which Mr. Daly had previously worked upon, and the evidence with respect to the training of at least one junior employee to operate a new CNC machine tends to confirm our concerns about the respondent's conduct. Similarly, there was nothing about that evidence which suggested that reinstatement with full compensation was not the appropriate remedy.



49. We now turn to the evidence with respect to the three petitions. It is well established that the Board scrutinizes the circumstances of petitions with great care. As the Board noted in *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813:

There is a natural suspicion which attaches to a statement of desire following closely upon a union organizing campaign. The Board must assure itself that the “change of heart” indicated by the employees who sign the petition in opposition to the union after having indicated support for that same union is a free choice unimpeded by overt or subtle pressures.

50. The burden of proving that, on the balance of probabilities, the petition represents the voluntary expression of the employees who signed it lies with the petitioners. The Board sets out its reasoning in this regard in *Radio Shack*, [1978] OLRB Rep. Nov. 1043:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and, having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.

See also *Conference Cup Co. Ltd.*, [1986] OLRB Rep. Jan. 72 for a fuller description of the Board’s approach.

51. Moreover, the Board has made it clear that it reviews the overall environment in the workplace in assessing the voluntariness of petitions. In *Radio Shack*, *supra*, the Board also said:

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the workplace in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. *The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it.* (See, *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

[emphasis added]

The jurisprudence also establishes that the test applied by the Board in these circumstances is objective rather than subjective (see *Linread Canada Ltd.*, 65 CLLC ¶16,050). In other words, the Board assesses in the circumstances of each case whether an employee might *reasonably* perceive the involvement of management in the statement of desire. It is neither necessary nor desirable to hear from individual employees with respect to their actual perceptions (see *Linread Canada*,



*supra*, and *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299 for a more extensive discussion of this point and see *Chung et al v. Amalgamated Clothing and Textile Workers Union - Toronto Joint Board et al.* 86 CLLC ¶14,036 (Supreme Court of Ontario) with respect to the difficulties of obtaining such evidence without destroying the confidentiality of the identity of employees who changed their minds).

52. We have a number of concerns about the combined effect of the sequence of events before us on the voluntariness of the Williams Machines petition and the second Material Processing petition. In the first place, although the references to job security in the respondent's letter of October 31st to employees were oblique, they suggested to employees that interruptions to the consistent and timely delivery of the respondent's products to McDonald-Douglas, the respondent's major supplier, could result in losing that customer. This suggestion, inserted in a three page letter citing the disadvantages of unionization, left no doubt as to what kind of interruptions were contemplated. The letters to employees of November 1st and 2nd which raised the issue of job security again then reinforced this suggestion, and promoted the shop committee as an alternative to the union. That alternative was further enhanced by the immediate negotiation and implementation of a layoff and recall policy, and the subsequent conclusion of a new wage and benefit package which echoed many elements of a typical collective agreement.

53. These two themes of job security and alternative representation were reiterated in Mr. Gee's speeches to employees on December 21st. Even if we accept the respondent's evidence as to what was said at those meetings, there is no dispute that Mr. Gee praised the shop committee and reviewed in detail the new wage and benefit package. Lest there be any doubt about the point of his remarks in this regard, he concluded his review by noting that all these improvements were negotiated without a third party. Mr. Gee then suggested to employees that the union campaign was negatively influencing the respondent's bids on new work, a statement which has obvious implications for employee job security.

54. The next event was on January 25th, the day on which notice of the union's application was posted, when the respondent laid off a high profile union supporter without any notice. At approximately the same time, the respondent handed out letters to employees which set out the petition process and contained statements to the effect that supporting the union would jeopardize employees' efforts, and change their relationship with the company forever.

55. In these circumstances, the evidence points to the very real possibility that employees signed both the Williams Machines petition and the second Material Processing petition, not as a genuine expression of their views on union representation, but because they were concerned about their job security, either collectively in terms of the supply of work or individually as a result of Mr. Daly's layoff. Indeed, even Mr. Davidson told the Board that he had heard from employees who supported the union that Mr. Daly was laid off because he was a union supporter. Although this evidence may have a self-serving aspect to it, it is given independent reinforcement by the circumstances of Mr. Daly's layoff. In other words, the events leading up to the petition would raise natural concerns in the mind of a reasonable employee with respect to his or her continued employment.

56. In the case of the Williams Machines petition, this is compounded by the fact that Mr. Davidson and Mr. Nussli collected almost all of the signatures on the respondent's premises, and the majority of them at the January 28th lunch meeting in the storage area. Since this was an area into which management might walk at any time, (and indeed is adjacent to the maintenance area where the maintenance foreman's office is located) the only reasonable conclusion employees could draw was that Mr. Davidson and Mr. Nussli had at least the respondent's tacit approval for

their activities. It was not suggested that employees are normally permitted to commandeer parts of the plant for their own purposes. This conclusion is particularly likely in light of the respondent's January 25th letter which tends to encourage precisely the type of activity that Mr. Davidson and Mr. Nussli were undertaking.

57. The fact that Mr. Nussli is a lead hand and had taken over some of the maintenance foreman's duties between February and November of 1990 exacerbates this situation. Even if we accept the evidence of the respondent and the interveners in its entirety in this regard, there is no question that Mr. Nussli was performing some of the paper work usually handled by the maintenance foreman, including checking time sheets against punch cards, ordering material and logging information in maintenance files, as a result of which he was spending more time in the maintenance foreman's office. The effect of this, when combined with his duties as a lead hand, the apparent freedom he and Mr. Davidson had to use the storage area for non-work purposes, and the respondent's written references to the petition process, would all suggest to employees that the Williams Machines petition was approved of or even sponsored to some extent by the respondent, regardless of whether this was in fact the case. In these circumstances, a reasonable employee might well perceive that whether he or she signed the petition was likely to come to the attention of the respondent. Where this is the case, the Board has been concerned that in light of the vulnerable nature of their relationship to their employer, employees will sign a petition with a view to establishing or redeeming themselves in the eyes of their employer rather than as a voluntary expression of their views on unionization. We share those concerns in the present case, and indeed those concerns are amplified by the events described above leading up the circulation of the two January petitions.

58. In the case of the second Material Processing petition, we do not have the same concerns with respect to Mr. Kelly's status. However, all the signatures were collected on the respondent's premises, and the majority of them were collected at employees' work stations. The Board has found previously that these facts may suggest to employees that the petitioners' activities have the implicit approval of management, with the same negative effect on the voluntariness of their signatures. In this case, as with the Williams Machines petition, that perception would be strengthened by the reference to the petition process set out in the respondent's letter of January 25th.

59. In other words, the events leading up to the petition were such as to link unionization with lessened job security. We do not think that it matters that some of the respondent's references to job security were rather delicately phrased. As long as the message is clear, as it was here, an employer cannot hide behind skillful or elliptical wording. The petitions were then circulated in circumstances where it appeared that they had at least the tacit approval of management, if not its sponsorship. As a result, they cannot be considered an accurate gauge of employees' wishes with respect to collective bargaining.

60. For all these reasons, we were not satisfied that the second Material Processing petition and the Williams Machines petition represented voluntary expressions of employee wishes with respect to union representation, and we declined to exercise our discretion to order a vote. With the exception of the layoff of Michael Daly, we have not decided whether the respondent's letters and other activities were violations of the Act as this was not in issue between the parties.

61. With respect to the first Material Processing petition circulated in November, only seven employees signed it. Thus, even if we were to assume, without finding, that it was voluntary, it involves such a small minority of employees that it would not cause us to exercise our discretion to order a vote in any event. As a result, it is not necessary for us to determine the voluntariness of this petition. It is therefore also unnecessary for us to make any determination with respect to



whether the origination of this petition was influenced by Mr. Kelly's conversation with Mr. Sykes, or the respondent's letters and activities which preceded it. Our separate conclusions with respect to both Material Processing petitions also make it unnecessary for us to make any determination with respect to whether Mr. Kelly told employees that he had made phone calls with respect to either petition from the office of the respondent's Vice-President of Finance.

62. We turn now to the allegations with respect to the membership evidence. The first involved an exchange between employees Alex Roberts and Nigel Grimsteen in November of 1990. Mr. Grimsteen told the Board that he was assuring employees on the shop floor that management was addressing issues of concern to them when Mr. Roberts approached him and told him in essence that if Mr. Grimsteen screwed this up for him or anybody, he was going to get Mr. Grimsteen. According to Mr. Grimsteen, Mr. Roberts also said that if Mr. Grimsteen did not keep his mouth shut, Mr. Roberts was so upset that he would smack Mr. Grimsteen on the head.

63. Mr. Roberts' version of this event is that Mr. Grimsteen was telling employees about the shop committee's negotiations with the respondent, and that he said to Mr. Roberts that he got a warm feeling from negotiating with Mr. Asaris. Mr. Robert told him to "get real, you don't negotiate with warm feelings". Mr. Grimsteen started to walk away from Mr. Roberts, and then returned and yelled in Mr. Roberts' face that he was doing the best job he could. Mr. Roberts replied that if they had not been at work and Mr. Grimsteen had yelled in his face like that, he would have punched Mr. Grimsteen in the face. This altercation took place in the early morning before work had started.

64. Again, we do not find it necessary to determine which account of this incident is more reliable. Even assuming, without finding, that the respondent's evidence is to be believed, there is no suggestion that the altercation had anything to do with membership evidence or obtaining signatures on membership cards. Heated disputes between employees are not uncommon during organizing campaigns. There was simply nothing even in Mr. Grimsteen's testimony that indicated any defect or flaw in the membership evidence which might have prompted us to either dismiss this application or order a representation vote.

65. The second membership evidence allegation involved employees Martin Hammersley and Danny McDougall. Both were first class anodyzers in the Material Processing division who have worked together for eleven years. Mr. McDougall was a union supporter and had extolled the virtues of union representation to Mr. Hammersley on several occasions. Mr. Hammersley testified that Mr. McDougall told him in November that if he did not sign a union card, he could no longer work there. Approximately one half hour later, Mr. Hammersley told this to Mr. Grimsteen, who replied that Mr. McDougall was "full of shit" and went over to speak to the latter. Shortly thereafter, Mr. Hammersley testified, Mr. McDougall came over to Mr. Hammersley and said that he did not mean to threaten Mr. Hammersley's job, but that was the way the law worked.

66. In cross-examination, Mr. Hammersley recalled that Mr. McDougall had said that the union was coming in anyway because they had enough cards now, that Mr. McDougall had referred to a closed shop agreement, and that he had said that once the union was in, Mr. Hammersley would have to sign a card. He agreed that the latter statement was what he had asked Mr. Grimsteen about. He also agreed that he had asked Mr. McDougall what would happen if the union came and there was no work for his machine, and whether he would be sent home in those circumstances.

67. Mr. McDougall testified that he told Mr. Hammersley that the union would be coming in, and that once it did get in, Mr. Hammersley would have to sign a union card or he did not think Mr. Hammersley would be able to work there. He told the Board that approximately one half hour



later, Mr. Grimsteen approached him and asked him what was going on between him and Mr. Hammersley, as Mr. Hammersley had told him that Mr. McDougall had threatened Mr. Hammersley's job over the union. Mr. McDougall replied that he had not threatened Mr. Hammersley's job, and explained that he had told Mr. Hammersley that once the union came in, he would have to sign a card. Mr. McDougall told the Board that Mr. Grimsteen replied that there was nothing wrong with what Mr. McDougall had said. Mr. McDougall then went to Mr. Hammersley and told him he was sorry if Mr. Hammersley thought that he had threatened his job. He also told him not to worry about it, and that he would never ask him to sign a union card again if it upset him so much.

68. Mr. Grimsteen, who testified on behalf of the respondent, told the Board that Mr. Hammersley had indeed told him that Mr. McDougall had said to Mr. Hammersley that if he did not sign a union card, he would not have a job. However, he also confirmed that when he approached Mr. McDougall about it, Mr. McDougall immediately responded that that was not what he had said, and that what he had said was that if the union got in, Mr. Hammersley would have to sign a card.

69. The Board has found in a number of cases that statements about job security did not taint the membership evidence when they were made by rank and file employees rather than union representatives. (See *The Gold Crest Products Limited*, [1974] OLRB Rep. March 142, *Canadian Electric Box & Stamping*, [1964] OLRB Rep. Sept. 284, *Green Grant of Canada*, [1973] OLRB Rep. June 376, *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611, *Covello Brothers Limited*, [1989] OLRB Rep. Feb. 119). In these cases the Board observed both that the employees in question had no authority over other employees nor any means of carrying out the consequences, and also that such statements could have been readily checked by the person to whom they were made. As a result, the Board found that such statements were not intimidating or coercive so as to call into question the integrity of the membership evidence.

70. In this case, Mr. McDougall was an employee who worked alongside Mr. Hammersley and who would not be presumed to have the kind of special knowledge that a union representative might. In addition, not only could the statement be readily checked, but Mr. Hammersley in fact did so, and was given reassurances to the contrary by Mr. Grimsteen. As a result, even if we accepted Mr. Hammersley's evidence in its entirety, on the basis of the Board's jurisprudence Mr. McDougall's statement could not be considered intimidating or coercive so as to prompt a representation vote.

71. In fact, we find that having regard to all the evidence, including Mr. Hammersley's acknowledgement that Mr. McDougall had mentioned a closed shop agreement, Mr. McDougall was actually referring to such a system and that he told Mr. Hammersley that if the union came in, he would have to sign a union card or he would not have a job. It appears that Mr. McDougall thought at the time that a closed shop was an inevitable consequence of unionization. Nevertheless, Mr. McDougall's comments were an accurate description of the effect of a closed shop, which was at least one possible consequence of unionization. Moreover, Mr. McDougall's comments made it clear that Mr. Hammersley could sign a card after the union came in. As a result, a reasonable employee would not be intimidated by such a statement into signing a membership card before the union was certified. Consequently, we declined to dismiss this application or to exercise our discretion to direct a vote on the basis of these facts.

72. Finally, we turn to the allegation by Mr. Kelly that the applicant refused to return his card, and the exchange between Mr. Kelly and Mr. Grant at the entrance to the respondent's property. There was no dispute that when Mr. Kelly originally signed a card, he did so of his own

free will and there was no suggestion of any technical defect or coercion in this regard. It was apparent from the evidence that after reading the respondent's letters of October 31st, November 1st and November 2nd, which among other things refer to the possibility of employees returning their cards to the union, and after discussions with other employees, Mr. Kelly changed his mind about the benefits of unionization. We also accept that Mr. Kelly communicated his request to Mr. Grant to have his card returned when he visited the applicant's office. However, the Board does not treat a revocation, resignation or withdrawal of membership as cancelling out or invalidating that membership card for the purposes of the Board's assessment under section 7 of the *Labour Relations Act*. (See *Caldwell Linen Mills Limited*, [1967] OLRB Rep. Mar. 948 and *Kraft Foods Limited*, [1967] OLRB Rep. July 349) and for the Courts' view, see *Re Royal Canadian Yacht Club and Hotel, Restaurant & Cafeteria Employees Union, Local 75 et al* (1982), 129 D.L.R. (3rd) 554 (Ontario High Court of Justice).

73. As the Board noted in *DI-AL Construction Limited*, [1982] OLRB Rep. Dec. 1822, the definition of "member" in the *Labour Relations Act* is not affected by a purported resignation:

13. The respondent contends that since Mr. Faubert signed a resignation from membership in the union, the Board cannot regard him as a union member for the purpose of determining the number of employees who are members of the union under section 6 of the Act. We do not agree. In determining who is a union member for the purposes of the Act, we are bound to apply the definition set out in section 1(1)(1). This section states that a member of a union includes someone who has signed an application for membership and paid a dollar to the union. Mr. Faubert performed both of these steps, and in our view the mere fact that he signed a purported resignation does not detract from this fact. This is not to say, however, that the Board will simply ignore a purported resignation from union membership. The Board's longstanding practice is to treat a purported resignation in the same manner as a statement of desire in opposition to a union's certification signed by a union member, namely, as an indication that the member has had a "change of heart" about union representation. On the basis of such a change of heart the Board may direct the taking of a representation vote, notwithstanding the fact that the union would otherwise be entitled to automatic certification.

74. In other words, to be a member of a trade union under the Act for the purposes of our assessment under section 7, one need only have *applied* for membership in the manner stipulated by the Act and the Board's jurisprudence. Where an employee has applied but subsequently changes his or her mind and wishes to revoke or withdraw that membership, it is treated by the Board like any other change of heart by an employee. It does not operate to somehow retroactively eliminate the fact of the original application. Rather, if it is filed with the Board in accordance with the Board's Rules, and if it is found to be voluntary, it may influence the exercise of the Board's discretion to direct a representation vote. As in the case of any other statement of desire in opposition to the union signed by union members, this is not because the revocation has any weakening or invalidating effect on a properly collected membership card which meets the requirements of the Act and the Board's jurisprudence. It is because a subsequent voluntary change of heart on the part of an employee casts sufficient doubt upon his or her *continuing* wish to be represented by a union that the Board often deems it advisable to direct a vote.

75. *Caldwell Linen*, *supra*, the Board observed that statements in opposition to the union take a variety of forms, including references to withdrawing or revoking membership. Indeed, in this particular case, the first Material Processing petition speaks of employees wishing to have their "votes reneged". Regardless of whether a petition is framed in these terms or expressed as a change of view, the Board will treat it in the same manner because it represents the same type of event with the same consequences. If, of course, the wording of the petition is not clear, this may have an impact on the Board's decision with respect to the weight to be assigned to it. Nonetheless, this is a different issue from that of how an employee's subsequent change of heart is expressed.



76. If Mr. Kelly's request can be characterized as a revocation or resignation of membership, we do not think such a revocation or resignation which was not made in writing and which was not filed with the Board can have any greater effect than one that meets the requirements of the Board's Rules. In other words, if a written voluntary revocation which is served on the union and filed with the Board in accordance with the Board's Rules (as the Board was content to assume in *Caldwell Linen, supra*) at its highest does not affect the validity of membership evidence in itself but is only relevant to whether an employee has changed his or her mind subsequently, a verbal request which does not meet the requirements of the Board's Rules can scarcely be said to have any greater effect. As a result, we find that the union's refusal to return Mr. Kelly's card does not create a defect in the membership evidence. We note that there was no evidence with respect to the other employees who attended with Mr. Kelly at the applicant's local office, and thus we do not know if membership cards were in fact submitted for them or whether they returned to the office and obtained their cards. However, even if we assumed that their circumstances were similar to Mr. Kelly's, the effect would be similar as well; that is, their membership cards would not be invalidated for the purposes of our assessment under section 7.

77. Nor are we prepared to treat Mr. Kelly's verbal request as a statement of desire in opposition to the application. Mr. Kelly did not commit his request to writing and file it with the Board before the terminal date in these proceedings as is required by the Board's Rules of Procedure. In that respect, his request is like any other employee submission which does not meet the requirements of the Board's Rules. We see no reason to depart from the Board's normal practice in this regard in the particular circumstances of this case. This is especially so since Mr. Kelly did in fact file two petitions in accordance with the Board's Rules which indicated his own change of heart, among other things, and which we have dealt with in accordance with the Act and the Board's jurisprudence. In other words, his views were ultimately communicated to and addressed by the Board in the appropriate manner.

78. Finally, there is nothing about the argument between Mr. Grant and Mr. Kelly that points us to a different conclusion. It was apparent that Mr. Kelly decided not to pursue the idea of getting his card back shortly after visiting the applicant's office. He did not return to that office to obtain his card, as Mr. Grant instructed, apparently because he subsequently became aware of the petition process and began to pursue that option. In these circumstances, Mr. Kelly's comments at the property entrance appear to have been largely for the benefit of the plant manager and other supervisory personnel emerging at that point. We prefer the evidence of Mr. Grant on the events at the plant gate to that of Mr. Kelly, as the latter was not a particularly credible witness. However, even if we accepted Mr. Kelly's version of this incident, the most that can be said about it is that the applicant refused to return Mr. Kelly's card, the legal effect of which we have already addressed. The honours with respect to insulting language appear to have been fairly evenly divided, and this kind of exchange is far from the sort of intimidation which might move us to order a vote.

79. For all these reasons, we issued a certificate to the applicant union.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN; April 6, 1992**

1. This dissent will deal with both the termination of Mr. Daly and the granting of bargaining rights without a secret ballot vote.

2. I will not comment exhaustively on the recitation of the evidence in the majority decision much beyond observing that I view the evidence in a different light and, as a consequence,



draw inferences at variance with the majority. The majority view of the Daly complaint will serve to illustrate.

3. As noted in the majority citation from *Pop Shoppe (Toronto) Limited, supra*, the Board must distinguish “between the unlawful and the unfair”. That decision goes on to assert that an action which may be, or appear to be, unfair should not be automatically regarded as unlawful merely by proximity in time to an organizing campaign. I accept the evidence of Mr. Asaris that but for the manner in which Mr. Daly reacted to the notice of his impending lay-off the lay-off would not have been immediate. While it is not open to me to conjecture whether with the additional passage of time the company might have reconsidered the question of who should be laid off, it is open to me to infer that the decision to pay Mr. Daly in lieu of notice was based on his reaction to the notice of lay-off and not his union activities. Had the decision been animated by the latter, I think it more reasonable to assume there would have been no consideration given to Mr. Daly working out his notice, rather the employer would have treated the matter as a case of discharge for cause.

4. In the case before us, the company made no suggestion that Mr. Daly was in any way an unsatisfactory employee except for the fact that, in their view, he did not have the requisite experience on in-house equipment to meet their immediate future needs and to warrant his retention over any other employee under the terms of the recently announced lay-off policy.

5. Turning momentarily to the lay-off policy agreed to by the company and shop committee, (see paragraph 13 of the majority decision), the wording is susceptible to an interpretation which would have allowed Mr. Daly to “bump” an employee in a lower wage grade, such as labourer, assuming he had greater seniority than the individual being bumped. This, perhaps, explains the presence of the following wording in paragraph 42 of the majority decision:

“... and even if we assume that he (i.e. Daly) could not perform the job of a labourer.”

6. I do not believe the parties necessarily contemplated the policy working in a fashion such as to have skilled workers displacing labourers however desirable such a provision might be in terms of avoiding the loss of skilled personnel. If the bumping of labourers was contemplated it was not argued by union counsel that Mr. Daly should have bumped a labourer.

7. It is not uncommon for parties “negotiating” at a local level to arrive at contract language which, although patently ambiguous to a lawyer, is well understood by the parties and thus suitable for its intended purpose. In this case, I believe management and the shop committee reached an agreement mutually understood as to its purpose but flawed as to its implementability or, at worst, as to management’s implementation.

8. I do not share the majority view that the respondent’s actions were motivated from an awareness that Mr. Daly was a high profile union supporter who publicly displayed his allegiance. Mr. Daly’s CAW cap and T-shirt would not, in my view, have been of any higher profile than those of the many other employees whom, from the evidence, were similarly attired.

9. Nor do I believe Mr. Daly’s departure would have affected the thinking of employees at Williams Machines or at Material Processing. It should be noted that employees in the two divisions have very little contact with each other for any purposes. It could be inferred that Material Processing employees would have had no knowledge of Mr. Daly let alone his employment status.

10. As mentioned in paragraph 8 of the majority decision Williams Machines operates in sophisticated high technology markets. That it enjoys sole supplier status with certain of its cus-

tomers is testament to high quality production. The bargaining unit employees who testified in support of the Williams Machines petitioners were themselves well spoken and sophisticated to the point that their evidence demonstrated sincerely held beliefs as to the implications both for themselves and their company should they lose the advantages of sole supplier status. Their testimony also demonstrated a reasoned view that their company was succeeding in a highly competitive and largely export market, and that their good reputation for both quality and delivery reliability could be comprised with the introduction of a labour union.

11. It was apparent to me from both the substance and delivery of the evidence that Messrs. Davidson and Nussli had been quite capable of formulating these views without the assistance of management and that they had indeed done so.

12. They asked only that a step which they believed would substantially affect their futures and that of their company be presented to their colleagues for thoughtful consideration and then tested by a secret ballot vote. I would have acceded to the request.

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**0043-92-U; 0045-92-U Teamsters Local 230, Ready Mix, Building, Supply, Hydro & Construction Drivers, Warehousemen & Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Complainant v. Angelo Natale and Lorenzo Borrelli, Respondents; Teamsters Local 230, Ready Mix, Building, Supply, Hydro & Construction Drivers, Warehousemen & Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Complainant v. Ontario Aggregate Haulers Benevolent Association and Lorenzo Borrelli, Respondents.**

**Construction Industry - Strike - Unfair Labour Practice - Teamsters complaining that, by setting up picket line at excavation site, members of respondent Aggregate Haulers Benevolent Association performing act which they knew would lead employees at site to engage in unlawful strike - Evidence disclosing that picketers talking to some drivers and delaying some for periods between 3 to 10 minutes, but Board hearing no evidence that operation of employer disrupted - Board hearing no evidence as to content of any conversations with drivers - Board ruling that evidence not making out necessary components of illegality - Application for relief under section 94 of the Act dismissed - Unfair labour practice complaint based on same allegations considered adjourned sine die**

**BEFORE:** K. G. O'Neil, Vice-Chair.

**APPEARANCES:** David McKee and Frank Marrano for the complainant; A. Natale, Irene Lauria and Lorenzo Borrelli for the respondent.

**DECISION OF THE BOARD;** April 16, 1992

1. The names of the respondents in Board file 0043-92-U have been amended to remove the reference to Ontario Aggregate Haulers Benevolent Association and to add Angelo Natale as a respondent.

2. This decision concerns an application for relief under section 94 [formerly section 92] of the Act based on allegations that the respondents have violated section 78 [formerly section 76] of the Act. The Board's decision of April 8, 1992 dismissed the complaint, after an expedited hearing, with further reasons to follow. These are the Board's full reasons.

3. The complaint in summary is that the respondents by setting up a picket line at an excavation site performed acts which they knew or ought to have known would have the reasonable and probable consequences that others, i.e. employees at the site, would engage in an unlawful strike. The respondents reply that neither they nor the association they represent is a trade union, and the complaint should be dismissed on that basis. Further, they assert that their activities were in the nature of a demonstration which is not prohibited by the Act. The following findings of fact are made on the basis of the evidence given by Julian Basso, General Manager of D'Orazio Drain and Watermain Company Limited (D'Orazio) and Frank Marrano, a Teamsters Business Agent. No evidence was called by the respondents.

4. The complainant (the Teamsters) and D'Orazio are bound by a collective agreement. Operating under the name D'Orazio Excavating Contractors Inc., D'Orazio currently employs truck drivers covered by the collective agreement with the Teamsters to haul material from an excavation site near Jane St. and Highway 401 (the job site). Material is also hauled from this job site by trucks driven by people who are not D'Orazio employees, presumably on a contract basis. Applicant's counsel said that no one doing the acts complained of is in any employment relationship with D'Orazio.

5. Messrs. Natale and Borrelli, the respondents, are representatives of The Ontario Aggregate Haulers Benevolent Association (the Association), a corporation without share capital. It was undisputed that one of the purposes of the Association is to prevail upon contractors to pay more to owner/operators to enable them to better cover their own costs. Evidence established that, sometime in mid-March, 1992, D'Orazio's General Manager, Julian Basso, had a conversation with the Association's Ms. Lauria in which he was asked to sign a letter of intent committing to pay a higher rate to owner/operators than he was willing to pay. He informed her that he wanted the freedom to call whomever he wanted and that he would only pay the higher rate if everyone else in his position would pay it. She urged him to treat the drivers better and suggested he approach the party with whom he had his contract for the excavation work and ask for more money for the "drivers", but did not threaten him with a strike. There was no evidence that D'Orazio was in any contractual relations of any kind with the Association or any of its members. Mr. Natale stated at the hearing that the Association's members intended to refuse to work on the D'Orazio site until the company agreed to better rates.

6. On Thursday, April 2, Basso arrived at the job site and saw a police car and ten or fifteen people leaving the site. He saw no signs and gave no evidence of any other activity on that day. On Monday, April 6, late in the afternoon, Basso was again at the job site but saw no activity with reference to the Association, and specifically said he saw no sign that said "On Strike".

7. Frank Marrano, Business Agent for the Teamsters, was also at the job site on Monday, April 6, starting at approximately 6:30 a.m., before work started shortly after 7:00 a.m. He observed a number of trucks belonging to D'Orazio, which would be driven by Teamsters. Also on site was a Santino Brothers truck and two trucks owned by Quinte Caponecchia. At approximately 8:00 a.m., people whom he did not recognize started to show up on the sidewalk outside the north gate to the site. Marrano testified that the people on the sidewalk walked back and forth in front of the gate when trucks were going in and out of the site. Later on in the day, around early afternoon, he saw Natale and Borrelli there. Natale was passing papers to the men at the south gate, Marrano



said, but there is no evidence as to what was on the papers. At the north gate, at one point, Natale was out of his car standing on the street.

8. When Marrano was leaving the site to make a phone call at one point he saw Borrelli's car stopped while he talked to people on the sidewalk. Marrano had to drive up on the sidewalk a bit to get past Borrelli's car. There was no truck behind Marrano at that point. He could not say if Borrelli ever turned off the engine or got out of the car. Marrano saw up to seven or eight people at the north gate and somewhat more at the south gate at one point. He recognized some people as owner/operators.

9. Marrano said trucks were delayed by the people on the sidewalk "sometimes 3 minutes" and that he timed one at almost 10 minutes. He saw no signs, and said he did not see anyone talking to the drivers on the Monday. He said that if it was a D'Orazio truck at the head of the line going in or out, they were not being stopped. Rather, people on the sidewalk were trying to stop or delay the Santino Brothers and Caponecchia trucks. If there were D'Orazio trucks behind the others, however, their departure or entrance was also delayed, as there was no room for them to get by. The evidence did not detail how many times, or for how long any D'Orazio truck was delayed.

10. Quinte Caponecchia, driving one of his own trucks, was one truck driver Marrano identified as being stopped. Caponecchia's other truck on the site was driven by his one employee. Caponecchia is also a Teamster.

11. On Monday afternoon, Marrano said two (possibly more) empty dump trucks circled the block on which the site is located. They stopped on the street on the south side of the site and the two drivers got out and talked to each other, but Marrano has no idea what they said. He observed the trucks in the area of the job site for approximately one and a half hours. He did not see them block any entrance or exit to the site (as had been pleaded).

12. On Tuesday, April 7, 1992, Marrano attended at the job site again at approximately 7:35 a.m. There were people on the sidewalk at the south gate on what Marrano referred to as the "so-called picket line", but he saw no signs or other form of identification. There were 5 to 6 people at first and by 11 a.m., approximately 25 people. Later on in the morning, there were also people on the north gate.

13. In addition to the trucks that had been on the site on Monday, Marrano saw two trucks from London Excavating Co. on the site on Tuesday. The driver of one of those trucks on that day is also a Teamster but not a D'Orazio employee. Marrano said that the activity by the people on the sidewalk was the same as on Monday, i.e. D'Orazio trucks were not stopped, but the other trucks were. Later on he said that there was no stoppage of trucks, but delay. He overheard someone on the sidewalk say the words "\$50 an hour" at one point. This is the rate the Association is seeking to have contractors pay owner/operators. There was no evidence as to the content of any conversations with the drivers whose trucks were stopped or delayed. On Tuesday, there were up to 25 people near the south gate at one point.

14. Marrano testified on cross-examination that the trucks leaving the site took in the vicinity of an hour to get to the dump with the material they were hauling, more or less, depending on a variety of factors, including traffic. He said it takes under 5 minutes to load a truck at the site. On Monday and Tuesday, the trucks were being loaded by a backhoe.

15. The Teamsters have approximately 590 members who own their own trucks and operate as owner/operators. When the union is asked to supply owner/operators, it does if there are

“enough trucks on the list”, in the words of Mr. Marrano. There are currently approximately 60 owner/operators on the list for whom there is no work.

16. There were various issues mentioned or alluded to during the course of the hearing which are unnecessary to decide in order to dispose of the application. Therefore I will not set out the comments made by both sides. However, these issues include the potential status of the Association as a trade union, the correct collective agreement to cover the job in question, the nature of the Teamsters’ obligations and/or jurisdiction over any owner/operators who are not dependent contractors, their meeting with owner/operators and the Teamsters’ status to bring this complaint.

17. Applicant counsel argued that were the Association a trade union, this would clearly be an illegal recognition strike, aimed as it is at getting recognition and an agreement from D’Orazio. He argued that Natale’s opening statement made the association’s purpose clear in saying “we will stay away from work until there is an agreement to pay” certain rates. Given that purpose, counsel asserts that the purpose of the activity at the site was to induce people to stay away from work. He asks the Board to conclude that these were acts designed, even if unsuccessfully on the occasions in evidence, to get people to stay away from work until D’Orazio concluded an agreement with the association.

18. Counsel cited numerous cases, all of which have been considered. These were *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569, *United Brotherhood of Carpenters and Joiners*, [1978] OLRB Rep. Aug. 776, *Sarnia Construction Association*, [1982] OLRB Rep. June 922, *Toronto Transit Commission*, [1984] OLRB Rep. Dec. 1781, *Art Gallery of Ontario*, [1989] OLRB June Rep 537, *Bay-Tower Homes Company Ltd.*, [1988] OLRB Rep. Jan. 4 and March 259 and *Horton CBI, Limited*, [1985] OLRB Rep. June 880.

19. In distinguishing the Art Gallery case, applicant’s counsel argued that unlike the art gallery employees who picketed on their own time and urged people to go into the gallery and tell people they agreed with them, in the case before us, the Association wanted people to stay away from work. The practical consequence of their activities was to directly slow down the work on the site of the employees of Santino Brothers, Caponecchia and London Excavating, and indirectly that of employees of D’Orazio. He urged the Board to find that the facts of this case were much closer to *Horton CBI, supra*, where the Ironworkers picket line was recognized as what it is in the construction industry - an invitation to stay away from work. Counsel argues that if the people on this site had done what they were asked to do by the Association’s people, they would have stayed away from work. In his submission, this means that the reasonable and probable consequence of their activities would be an unlawful strike by others. To the extent that employees are willing to stay and talk to the association’s people it will slow down and restrict output. The quantity of any delay should not be determinative.

20. For the respondents, Mr. Natale asked that the matter be dismissed because the Board has no jurisdiction over the Association or its representatives, as the Association does not have status as a trade union at this point in time. He asked the Board to reject the allegations as inflammatory and untrue. He characterizes the association’s activities as a demonstration, part of his work over the last twenty-three years to improve the lot of owner/operators. He maintains that the evidence does not show one minute of interference with employees’ work at the site.

21. During opening statement, applicant counsel withdrew allegations against the Association, as it concedes it is not a trade union, and withdrew the complaint as it related to sections that could be violated by a trade union, but not a “person”, i.e. sections 74 and 76 [formerly 72 and 74]. The named respondents were amended to delete the Association and to add Mr. Natale.

22. The sections of the Labour Relations Act relevant to this decision are as follows:

1.-(1) In this Act,

“strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

78.-(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

94. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do an act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, the Board may so declare and it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

23. Mr. Natale argued that the Board had no jurisdiction over the Association because it is not a trade union. The Board finds no merit in this submission. It is clear that “a person” is capable of violating section 78 and thus the fact that no one was arguing that the Association is a trade union in this proceeding is not determinative of the issue before me as to whether that provision has been contravened.

24. The Board, after hearing and considering all the evidence and argument, dismissed the complaint in its April 8 decision. The Board's reasons for dismissing the complaint can be briefly stated. The quite unusual facts of this case, as brought out in the evidence before me, are not sufficient to be considered illegal strike activity, or activities which would have the reasonable and probable consequence that others would engage in illegal strike activity.

25. It was not argued that the people on the sidewalk, not being employees, were engaged in an illegal strike. Rather, it was submitted that they were likely to cause others to engage in an unlawful strike. All of the submissions made by Mr. McKee as to the illegality of recognition strikes, and the general nature of picketing on constructions sites, as set out in *Horton CBI, supra*, are quite accurate and nothing in this decision should be taken as detracting from or disagreeing with the jurisprudence cited. However, the evidence did not establish that this was an ordinary construction industry picket line. In opening statement Mr. Natale said they had made signs that said such things as “Now or never”, “OHBA Only Voice for Truckers”, “Slavery is Over”, “We are Not a Finance Company for the Excavators or Contractors.” Even if the Board assumed that those messages could be interpreted as urging employees to strike, the evidence did not disclose the presence of any signs on the job site. Both witnesses expressly denied seeing any. The evidence of communication with the truck drivers entering and leaving the site is that the people on the sidewalk walked back and forth when non-D'Orazio trucks were at the gates, delaying some of them for periods between 3 to 10 minutes, and talking to some drivers. The evidence is devoid of any evidence as to the content of any conversations with the drivers. There is no evidence that the



operation of the employer was disrupted at all despite the fact that its general manager gave evidence.

26. I infer from the evidence that some work of some drivers was delayed a small period of time. The significance of this in a work cycle from the site to the dump and back again that takes over two hours from start to finish, and in the absence of any evidence of any close timing of the operation, or practices as to breaks, is unclear. Are the employees of contractors, or of D'Orazio, allowed to talk to others on entering or leaving the site or not? Are delays of this extent for conversation common or not? The evidence does not assist with the answers to these questions.

27. I agree with applicant's counsel that neither the extent of the delay, nor the success of any efforts to persuade people to leave work, are determinative on an application such as this. However, in deciding whether the reasonable and probable consequence of the activity in this case would be an unlawful strike by the Teamsters or others, these are facts to be considered, along with all the other circumstances.

28. As the Act's definition of strike clearly sets out, a strike involves concerted activity designed to restrict or limit output. Is it a reasonable and probable consequence of the activity in evidence that employees would respond in concert by slowing down, curtailing or leaving work? In answering this question in the negative, I am influenced by the following facts. The Association is not a trade union whose picket lines are likely subject to the same solidarity response described in *Horton CBI, supra*. Rather, the circumstances of the case and some of Mr. Natale's statements at the hearing suggest it is to some extent a rival organization to the Teamsters. More importantly, the evidence disclosed no attempt by anyone to ask D'Orazio employees to slow down or stop working. Indeed, it showed no effort to talk to them at all but rather a specific targeting of non-employees. I cannot conclude that indirect and (on the evidence) likely involuntary delays in the work of employees of the nature set out above constitute a work slow down as contemplated by the Act at all, or that the actions which caused those delays would reasonably or probably result in employees being persuaded to take concerted action to curtail work themselves.

29. Without evidence of what was said to any employees of any of the sub-contractors' trucks on site, it is equally difficult to conclude that they were being exhorted to engage in a concerted work curtailment or likely would have as a result of their contacts with the people on the sidewalk. There is no evidence that any did. In addition, the only evidence about employees of subcontractors suggested that an individual employee of each of two different contractors *may* have been spoken to. In the circumstances of this case, without some further evidentiary basis, it would be an unwarranted stretch to find any concerted activity by two individuals in two different employment relationships to be a reasonable or probable response to any stimulus. Although the number of people on the sidewalk near the job site and the economic objective they have raises a legitimate question as to the nature of the activity, the evidence simply does not make out the necessary components of illegality.

30. The pleadings, which will not be repeated here, make very serious allegations of wrongdoing. The evidence in this case fell far short of establishing what was pleaded. The reasons for that were not addressed before the Board, and therefore it is not possible to comment on them. However, if the evidence had made out the activities pleaded, the result in this case could very well have been different. As the situation was ongoing at the time of the hearing of this matter and may still be, it is important for the Association and its members to draw an appropriate line between communicating information to people in a lawful manner as opposed to encouraging others to engage in unlawful strikes, i.e. untimely concerted work slowdowns, stoppages, or restrictions, with their potentially very serious consequences.

31. A section 91 [formerly section 89] complaint based on the same allegations was also filed in Board File 0045-92-U. That matter had not been formally processed when the expedited hearing in this matter was held. Counsel acknowledged the identity of the pleadings in that file with the section 94 complaint. Given that a full panel of the Board would normally deal with the section 91 complaint, but having regard to the counsel's remarks during these proceedings, that complaint will be considered adjourned sine die. Unless within a period of one year either party requests that the Board proceed with the matter, it will be terminated.

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**1714-90-R** The Society of Ontario Hydro Professional and Administrative Employees, Applicant v. **Ontario Hydro**, Respondent v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, Intervener v. The Coalition to Stop Certification of the Society on behalf of certain employees, Objectors

**Certification - Pre-Hearing Vote - Voluntary Recognition - Union advising Board that outstanding representational issues resolved on basis of executed and ratified voluntary recognition agreement - Union seeking leave to withdraw certification application - Individual employee asking Board to address issues raised earlier in proceeding - Application dismissed**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

**DECISION OF THE BOARD;** April 6, 1992

1. This is an application for certification in which a pre-hearing representation vote was taken pursuant to a decision of the Board dated January 31, 1991. All ballots were segregated. A hearing was conducted on March 25, 1991 to receive the representations of all interested persons with respect to the order in which and procedure(s) by which the issues in dispute in this application should be heard and determined by the Board. Following that hearing, by letter dated April 8, 1991, representatives of The Coalition to Stop Certification of the Society ("the Coalition") alleged that Ontario Hydro had permitted the use of the internal mail system by the Society in contravention of section 64 of the *Labour Relations Act* ("the Act") and that the Society had used that system to solicit membership in support of certification in what the Coalition alleges is a violation of section 71 of the Act. They asked that the Board exercise its discretion under section 89(4) to inquire into that complaint and, by way of remedy, direct Ontario Hydro to provide the Coalition with full access to the internal mail system under the same conditions as the Society.

2. The Board's decision with respect to the many issues reviewed at the hearing of March 25, 1991 and to the Coalition's complaint of April 8, 1991 stood reserved when, in July 1991, the applicant advised the Board that it had entered into an agreement with the respondent employer to engage in a process of negotiation and mediation with respect to outstanding issues in this application. It requested that no further hearings be scheduled pending completion of that process. That request was not opposed by any interested party. We were not asked to deliver a decision with respect to any of the matters addressed at the hearing of March 28, 1991 or in the Coalition's letter of April 8, 1991. We heard nothing more from any interested party until December 1991.



3. By letter dated December 3, 1991, an affected employee, Tom Stevens, wrote to the Board with reference to the contents of an "attached bulletin" published by the applicant. He referred to an agreement and proposed vote of employees. He asked the Board to "order the Society and Ontario Hydro to desist in this extra-legal proceeding" and give some direction as to the way any vote might be conducted to determine employee wishes. The "attached bulletin" was not attached to or enclosed with the letter. It was later received from Mr. Stevens under cover of a letter dated January 10, 1991. The bulletin, which was dated November 18, 1991, referred to an agreement between the applicant and respondent pursuant to which the respondent was prepared to recognize the applicant as collective bargaining agent for certain employees for purposes of the Act if the agreement was ratified by a vote of employees to be conducted by the applicant. It said such a vote was to be conducted between December 6, 1991 and January 13, 1992. It appears that the vote was essentially complete by the time the Board received the enclosure missing from Mr. Stevens' initial letter.

4. In a facsimile transmission dated January 22, 1992, and captioned with reference to this application, counsel for the applicant wrote that

All outstanding representational issues relating to Ontario Hydro and the Society have been resolved on the basis of an executed voluntary recognition agreement which has been ratified in a vote of all employees in the agreed upon bargaining unit.

In the circumstances we seek leave of the Board to withdraw the above-noted application for certification.

This was circulated, for comment, to all those who had expressed an interest in participating in this application, including Mr. Stevens. Responses have been received from Mr. Stevens, and from Mr. Crampton on behalf of the Coalition.

5. Mr. Crampton's response, a letter dated February 14, 1992, expresses a number of concerns, as well as a belief that some of those concerns might be the subject of other proceedings under the Act. He does not ask that the Board address those concerns or any of the matters raised by the Coalition earlier in these proceedings. In the end, his letter states that "[t]he Coalition agrees to the withdrawal of application 1714-90-R."

6. In his response, a letter of February 13, 1992, Mr. Stevens reiterates his earlier requests that the Board continue addressing the issues earlier raised in these proceedings, particularly the question of who is "managerial" and who is not. He also asks that we require a "real debate" and a further, supervised vote before affected employees become subject to a "Rand formula" provision in the agreement between the applicant and the respondent.

7. We are not being asked to approve the agreement referred to in the letter from counsel for the applicant. The applicant's request is simply that it be given leave to withdraw its application for certification. The only issues to which such a request would ordinarily give rise are whether the application should, instead, be dismissed and, if so, whether there should also be a bar to any further applications within the next six months. Having regard to the stage these proceedings had reached when the applicant made its request, the customary response (as the applicant undoubtedly knows) would be to dismiss this application without a bar. That response would not adversely affect any legal rights Mr. Stevens or any other interested party may have in relation to the circumstances surrounding the applicant's request to withdraw.

8. It is difficult to imagine any circumstances in which it would be appropriate for the Board to require an applicant for certification to pursue an application it did not wish to pursue. It would not be appropriate to do so merely because the Board had in hand a good deal of the infor-



mation necessary to dispose of the application. And lest Mr. Stevens' misimpression in this regard is shared, it must be said that the Board was not in that position when the applicant made its request: it would have taken years to hear and determine all the issues which were in dispute between the parties at the time of our last hearing in this matter.

9. Having regard to the stage it had reached when the applicant requested leave to withdraw it, this application is dismissed.

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## **2932-89-G International Union of Elevator Constructors, Local 50, Applicant v. Otis Elevator Company Limited, Respondent**

**Construction Industry - Construction Industry Grievance - Practice and Procedure - Remedies - Board allowing union's grievance in May 1991 decision and remaining seized on the issue of damages - Subsequent to May 1991 decision, Vice-Chair of panel issuing decision dying - Employer arguing that Board without jurisdiction to substitute Vice-Chairs and that liability issue would have to be reheard - Board satisfied that it has jurisdiction to continue**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Kurchak*.

**APPEARANCES:** *Maurice Green* and *Charles Murray* for the applicant; *M. Patrick Moran*, *Ed Wyzykowski* and *Andy Jensen* for the respondent.

### **DECISION OF THE BOARD; April 22, 1992**

1. This is an application pursuant to section 126 of the Act.
2. In a decision dated May 8, 1991, the Board dealt with the issue of whether the respondent had breached the collective agreement. After determining liability, the Board remained seized on the issue of damages.
3. The parties were unable to settle the damages issue, and this matter was relisted for hearing. In the interim, the Vice-Chair of the panel that issued the earlier decision, determining liability, had died. The instant Vice-Chair, together with the original Board members, sat on the panel convened to hear the damages issue.
4. The respondent argued that the Board was without jurisdiction in the circumstances to substitute Vice-Chairs. It submitted that the liability issue would have to be reheard, and that the proceeding would have to recommence, from the beginning.
5. The Board is satisfied, however, that it has the jurisdiction to continue. See, for example, *EKT Industries Inc.* [1987] OLRB Rep. May 696. Given that the issue of damages here appears to be an issue discrete from the question of liability, there is no requirement that only the original panel can consider the damages issue. However, should it become apparent that the decision of May 8, 1991 is not sufficiently clear in its meaning to enable the Board to determine damages without having to rehear evidence already led, then the parties may have to lead such evidence. The clarity of the prior decision can be addressed at the next hearing day.

6. This matter is to be relisted for hearing, to hear the parties' submissions on whether the prior decision is sufficiently clear in meaning, and if not, whether evidence dealing with liability is necessary, and any other preliminary matters. The parties should be prepared to lead evidence, so that the hearing can proceed if the Board rules that such evidence is to be allowed.

7. This panel is not seized.

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**3920-91-R United Steelworkers of America, Applicant v. Alros Products Limited  
c.o.b. as Polytarp Products, Respondent**

**Bargaining Unit - Certification - Employee - Pre-Hearing Vote - Employer taking position in reply to union's certification application that bargaining unit should include second location within municipality - Union claiming that employees not sharing community of interest - Union also seeking to reserve its right, pending further investigation following pre-hearing vote, to challenge managerial or employee status of employees at second location - Absent appropriate challenges being made up to and including the time of the actual taking of the vote, Board seeing no basis for directing segregation of all ballots - Board finding no basis for allowing union to reserve any right to make challenges following the taking of the vote**

**BEFORE:** *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

**DECISION OF VICE-CHAIR M. A. NAIRN AND BOARD MEMBER H. PEACOCK;** April 1, 1992

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.

2. The applicant filed its application for certification seeking a bargaining unit comprised solely of those employees at the employer's 350 Wildcat Road ("Wildcat Road") location. In its reply, the employer took the position that the appropriate bargaining unit should include its location at Wildcat and in addition, its Lepage Court and Regis Road ("Lepage Court") locations within the Municipality of Metropolitan Toronto. Consistent with that position, the respondent filed a list of employees in accordance with the Board's Rules of Practice, and identifying employees by their location. On March 20, 1992 the Board directed that copies of the reply and list of employees were to be communicated by a Labour Relations Officer to the applicant as soon as possible.

3. The parties were scheduled to meet with a Labour Relations Officer on Monday March 23, 1992 in accordance with an earlier direction of the Board dated March 12, 1992 for the purpose, essentially, of making the necessary arrangements for the conduct of the pre-hearing representation vote. On consent of the parties that meeting was adjourned to March 24, 1992.

4. As recorded in the report of the Labour Relations Officer, at that time the parties maintained their positions with respect to the appropriate bargaining unit description. Having set that out, the parties moved to a consideration of the list of employees in the partially agreed to bargaining unit and voting constituency. The applicant challenged the inclusion of the respondent's employees at Lepage Court in the bargaining unit. This challenge was based on the assertion that

these employees do not share a community of interest with the employees at Wildcat Road and there is no interchange of employees between the locations so as to warrant a bargaining unit more broadly based than Wildcat Road. These challenges simply reflect the parties' dispute concerning the appropriate description of the bargaining unit. The applicant also made challenges with respect to the managerial and/or employee status of certain individuals at the Wildcat Road location. The applicant then sought to reserve its right, pending further investigation, to challenge employees at the other locations with respect to the factors enumerated under section 1(3)(b) of the Act. The parties were directed to file any submissions to the Board with respect to this latter issue no later than 5:00 p.m., March 26, 1992.

5. We have received and reviewed those submissions and the Labour Relations Officer's report. According to the submissions received from the applicant the Officer offered to adjourn her meeting for a few days to permit the applicant to investigate and ascertain which, if any, Lepage Court employees it sought to challenge pursuant to section 1(3)(b) of the Act. A vote would then be taken of all the employees with the ballots of those employees whose eligibility to vote was in dispute being identified and segregated.

6. The applicant has requested that the Board direct that the voters' list include the names of all the employees and direct that the ballots cast by any employee at the Lepage Court/Regis Road locations each be segregated, and finally, that the applicant be permitted to investigate and raise additional challenges to the inclusion of *any* of those individuals on the voters' list within a reasonable period of time *following* the vote.

7. The applicant argues that to delay the Officer's meeting any further, in order for it to make inquiries among a group of employees with which it has no familiarity, would prejudice it. The applicant indicates that its concern is motivated primarily by the effects of delay. In its submissions the applicant states, "in taking advantage of the provisions of s. 9 of the Act, [it] was hopeful that the vote would proceed in a speedy fashion as the Act intended, and that any hearing regarding eligibility to vote would take place *after* ballots are cast".

8. A pre-hearing representation vote is a vote taken prior to the *hearing* of any issue in dispute. However the *identification* of issues in dispute takes place prior to (or in exceptional circumstances at) the taking of that vote. The applicant indicates that pre-hearing representation vote applications are dealt with expeditiously. We agree. As such, an applicant filing such an application (and any respondent) ought to be aware that it will be expected to be able to identify its issues expeditiously.

9. The importance of full disclosure by the parties who participate in the meeting with the Officer was referred to in *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589 at paragraph 6:

6. While we do not resolve such issues at this stage, we do need to know the immediate parties' position on any issue which could affect the use to which the results of a pre-hearing representation vote may later be put. This is so that a meaningful voting constituency or constituencies can be struck and appropriate direction made concerning segregation of ballots cast by individuals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. A pre-hearing vote is of little use unless one can later reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. Accordingly, when an applicant requests a pre-hearing vote, the Board's practice is to authorize one of its Labour Relations Officers to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of the appropriate bargaining unit, the description and composition of the voting constituency or constituencies, the list of employees as of the terminal date for the purposes of any vote which might be directed and all other matters relating to entitlement to and arrangements for such a vote, and to report to the Board thereon.



10. It was also discussed in *Simpsons Limited*, (Board File No. 1876-84-R, unreported decision dated October 28, 1985) at paragraph 14:

... It is necessary for the Board to know the positions of the parties and the nature of the dispute between them with respect to the appropriate bargaining unit, so that a meaningful voting constituency or constituencies can be struck and appropriate directions made concerning segregation of ballots cast by individuals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. One of the important objects of a Labour Relations Officer's preliminary meeting with the parties in these cases is to ascertain their position on the appropriate bargaining unit issue and define (and narrow, if possible) the nature of any disagreement on that issue. The pre-hearing vote process would be subverted if a respondent or intervener could advance for the first time at hearing a position or allegation which would, if accepted, render meaningless a pre-hearing vote which could have been conducted in a meaningful way if that position or allegation had been disclosed in an *appropriate and timely* fashion before the vote was conducted.

[emphasis added]

11. While there may be circumstances where a party has had insufficient time to conduct an appropriate investigation with respect to any challenges to the list of employees this is not that case. The applicant sought the list of employees in advance of the Officer's meeting. It was aware of the respondent's position encompassing a larger bargaining unit. The list was directed to be provided on Friday March 20, 1992 for a meeting the following Tuesday. There are only approximately twenty-five employees at Lepage Court. The respondent in its submissions makes reference to an earlier application for certification by this applicant. On January 23, 1992 (Board File No. 3370-91-R), this applicant made an application for certification. That file discloses that the applicant proposed a bargaining unit that included employees at Wildcat Road only. In its reply the employer described the appropriate bargaining unit as all its employees in the Municipality of Metropolitan Toronto and filed a list of employees, as it has in this case, reflecting that position. The parties met with a Labour Relations Officer, identified their dispute with respect to the bargaining unit description, reviewed the list of employees supplied by the employer and were provided with a "count". By letter dated February 19, 1992 the applicant requested leave of the Board to withdraw its application. By decision dated February 21, 1992 the Board, having regard to that request, and to the stage of the proceedings at which the request was made, dismissed the application. We note that the list of employees filed in that application is virtually identical to the list filed by the employer in respect of this application. The applicant simply asserts that it has no familiarity with these additional employees. For the applicant to take the position now that it has not had sufficient opportunity to satisfactorily investigate the issue of whether any of the employees at Lepage Court or Regis Road exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations is simply untenable.

12. Trade unions are often vocal about the need for expedition in Board proceedings particularly in certification applications. The Board shares the concern about delay and has for that reason over the recent past, for example, enlarged its certification "waiver" program and has emphasized the importance of the parties' meeting with a Labour Relations Officer where many issues can be resolved quickly and without the need for expensive and time-consuming hearings. That emphasis on the importance of the meeting with the Labour Relations Officer has, in essence, always existed with respect to applications under section 9. The Board's additional concern of course is to ensure the integrity and validity of its processes. The results of the Officer's meeting enable the Board to structure a pre-hearing representation vote with a voting constituency which can anticipate and provide for various possible outcomes based on the ultimate determination of the parties' disputes. The importance of parties' identifying their disputes is self-evident. The Board has not generally limited a party from making challenges following the holding of the Offi-

cer's meeting up to and including the time of the actual taking of the vote. After that however it is simply too late. A final consideration in the ability of the Board to maintain the expedited framework for applications for certification is the level of the Board's resources. In this case, it seems highly improbable that it would be necessary to challenge (and therefore segregate the ballots of) each of these employees. Absent appropriate challenges being made, we see no basis for directing segregation of all ballots. Nor is there any basis for allowing the applicant to reserve any right to make challenges following the taking of the vote.

13. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five percent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

14. Having regard to the partial agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

all employees of Alros Products Limited c.o.b. as Polytarp Products in the Municipality of Metropolitan Toronto, save and except Assistant Production Manager, persons above the rank of Assistant Production Manager, office, clerical and sales staff and students employed during the school vacation period.

15. Given the parties' dispute with respect to the geographic description of the appropriate bargaining unit we hereby direct that ballots cast by employees at Wildcat Road be segregated from ballots cast by employees at the Lepage Court/Regis Road locations.

16. It is the applicant's position that forepersons exercise managerial functions in accordance with section 1(3)(b) of the *Labour Relations Act* (the "Act") and therefore should be excluded from the bargaining unit. It is the position of the respondent that the assistant production manager classification represents the "first-line" managerial exclusion from the bargaining unit. Having regard to that dispute should John Bieuz, John Brymer, Elvio Cavvichia, Hardip Chhokas, John Gray, Horace McIntyre, Dave Waldman, Frank Giannetti, or Jerry Gillis seek to cast a ballot they will be entitled to do so. However that ballot will be segregated and not counted until the Board so orders or the parties consent.

17. The applicant takes the further position that Gil Van Meeteren is a security guard and therefore not an employee under section 12 of the Act. It is the position of the respondent that this person is not a security guard and is properly included in the bargaining unit. Should Gil Van Meeteren seek to cast a ballot he shall be entitled to do so. However that ballot will be segregated and not counted until the Board so orders or the parties consent.

18. All those employed in the voting constituency on March 20, 1992 who are employed on the date the vote is taken will be eligible to vote. We hereby direct that the ballot box be sealed and the ballots not counted until the Board so orders or the parties consent.

19. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

20. This matter is referred to the Registrar.

**CONCURRING DECISION OF BOARD MEMBER J. A. RUNDLE; April 1, 1992**

1. I concur with the decision. In light of the history of an initial application filed on Janu-

ary 23, 1992 and this subsequent application - it is my observation that this applicant is attempting to manipulate the process to meet their own ends. The allowing of challenges to a voters list *after* the vote has been taken is a procedure that this Board properly will not entertain for the reasons outlined in the decision.

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**3920-91-R United Steelworkers of America, Applicant v. Alros Products Limited c.o.b. as Polytarp Products, Respondent**

**Certification - Pre-Hearing Vote - Union applying for certification by way of pre-hearing vote - Terminal date set for Friday and Officer's meeting scheduled for following Monday - No opportunity to involve Board Officer in any kind of "waiver process" - Union requesting copy of employee list to review in advance of meeting - Employer objecting - Board directing that employee list be circulated immediately**

**BEFORE:** *M. G. Mitchnick*, Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

**DECISION OF THE BOARD;** April 3, 1992

1. This is an application for certification by way of Pre-hearing Vote. The respondent's material was received by the Board late on the terminal date, Friday, March 20th. The applicant requested an opportunity to review the Employee List and make any necessary inquiries prior to the onset of the meeting between the parties and the Board Officer. The problem was that the meeting with the Board Officer had previously been scheduled by the Board for the ensuing Monday morning. The respondent objected to the applicant's request to see the List in advance on the basis that the applicant had made a similar certification application once before, and withdrew it. The respondent therefore indicated it had a concern about abuse of the Board's procedures.

2. The Board recently set out its views regarding disclosure of the Employee List in *Cor Jesu* (as yet unreported), [now reported at [1992] OLRB Rep. Mar. 298], Board File No. 2718-91-R, decision dated March 16, 1992. As the Board there indicated, holding the List back from the applicant until the parties actually come together for a Board meeting or hearing is no longer acceptable. The List *ought* to be circulated and discussed prior to either such formal convening taking place, in the hope that the time and expense of either a hearing *or* a meeting can perhaps be avoided. That is particularly true in the case of a Pre-hearing Vote application, a procedure specifically designed to treat time as being of the essence, and where virtually any of the matters that may be in dispute are deferred until after the vote in any event.

3. In the present case, there simply was not the opportunity, given the receipt of the material, to involve a Board Officer in any kind of a "waiver" process, and a panel of the Board (Mr. Shamanski reserving) made the decision to circulate the List immediately, for whatever preparatory opportunity the weekend might provide for the applicant. In doing so, the Board noted that communicating the List on the Friday versus the Monday had no bearing whatever on the respondent's concern over potential "abuse". As the Board has stated in a variety of cases, the applicant would have an absolute right to see the List at *some* point in the proceedings, and the question of "abuse" is, as it always has been, simply one for the Board to address by way of refusal to entertain if and when a *subsequent* application for certification comes to be filed (again, see *Cor Jesu*, *supra*, and the cases cited therein).



**CONCURRING OPINION OF BOARD MEMBER G. O. SHAMANSKI:** April 3, 1992

1. I have agreed with the majority award in the particular circumstances facing the Board in this case.
2. It is my understanding that had the respondent delivered its material to the Board earlier, the Board would have followed the "Officer" procedure set out in *Cor Jesu*.

**2423-91-R; 2684-91-U Bakery, Confectionery & Tobacco Workers International Union AFL-CIO-CLC, Applicant/Complainant v. R.J.R. MacDonald Inc., Respondent v. Group of Employees, Objectors**

**Certification - Practice and Procedure - Unfair Labour Practice - Union seeking to withdraw certification application and unfair labour practice complaint - Employer urging that unfair labour practice complaint be dismissed "with prejudice" and that certification application be dismissed with endorsement reserving employer's right to argue that there should be a bar if the union filed a new application - Objectors asking Board to impose immediate six-month bar - Board considering rationale for imposing bar in certain cases and reviewing practical distinction between "withdrawal" and "dismissal" of Board proceedings - Certification application dismissed without bar - Complaint withdrawn**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *K. Davies*.

**APPEARANCES:** *Susan Ballantyne, Domenic Ricci, Dave Gibbons* and *Sean Kelley* for the applicant; *R. W. Kitchen* and *G. Tribble* for the respondent; *C. J. Abbass, Max Meharg* and *Bill Fulkerson* for the objectors.

**DECISION OF THE BOARD;** April 28, 1992

## I

1. This is an application for certification which was scheduled for hearing together with a related unfair labour practice complaint. Both proceedings were disposed of, with brief oral reasons, at a hearing of the Board on Friday, April 3, 1992.

2. In order to appreciate the way in which these matters were dealt with, it is necessary to sketch in some background. It is also useful to set out section 105(2)(i) [formerly section 103(2)(i)] of the *Labour Relations Act* which reads as follows:

105.-(2) Without limiting the generality of subsection (1), the Board has power,

...

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

## II

3. The certification application was filed on October 24, 1991, and originally came on for hearing before the Board (differently constituted) on November 22, 1991. At that hearing, various issues were resolved, but the parties remained in dispute about a number of matters, including the description of the “appropriate” bargaining unit. The applicant union asserted that certain seasonal workers should be included in the bargaining unit. The respondent employer asserted that the “seasonals” should be excluded.

4. In a decision of the Board dated November 27, 1991 (i.e., five days after the hearing), the Board issued a “bottom line” determination ruling that the “seasonals” should be *included* in the bargaining unit, as the union had argued. The Board indicated that its reasons for this determination would follow, and noted that the remaining issues would be dealt with by another panel of the Board (this panel, as it turned out).

5. The original panel’s reasons were issued on February 14, 1992. After dealing with the bargaining unit question, the panel noted that the remaining matters in dispute would continue before a differently-constituted panel (this panel) on March 11, April 2, 3, 9, 16 and May 11, 1992. It is not clear why the hearing could not have been convened earlier; however, the Christmas period intervened, and it may have been necessary to make some accommodation for the schedules of counsel, who were already briefed and immersed in the case. In any event, the case did come on for hearing before this panel on March 11, 1992.

6. As of March 11, 1992, the Board had before it both a certification application, and an unfair labour practice complaint which had been filed on November 18, 1991, a few days before the first hearing day. The allegations in that complaint need not be reproduced here. It suffices to say that they arose in connection with the union’s ongoing organizing campaign, and prompted the union to seek relief under both section 91 [formerly 89] and section 8 of the Act. Section 8 reads as follows:

8. Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Obviously, the certification application and the unfair labour practice complaint were intertwined.

7. On March 11, 1992 the Board ruled that the objectors had status to intervene in these consolidated proceedings. The parties then made an effort to settle the case, but they were not successful. They did however agree on an order of procedure, and undertook to exchange further particulars.

8. The hearing of April 2, 1992 was adjourned in a further unsuccessful effort to resolve the dispute in its entirety.

9. The proceeding resumed on April 3, 1992 as scheduled. At that hearing, the union sought leave to “withdraw” *both* the certification application, and the unfair labour practice charges. The other parties opposed those requests.

10. The respondent argued that the Board should *dismiss* the certification application, with

an endorsement specifically reserving the respondent's right to argue that there should be a "bar" pursuant to section 105(2)(i), if the union filed a new certification application. The respondent urged the Board to *dismiss* the unfair labour practice complaint, "with prejudice" - that is, in such manner as to preclude the union from filing any new complaint relying upon the "old" allegations.

11. The objectors also argued that the Board should "*dismiss*" the certification application; however, they urged the Board to impose an immediate six-month bar to prevent any new application for certification from being made. The objectors argued that the Board should also "*dismiss*" the unfair labour practice complaint "with prejudice", in the same manner urged upon us by the respondent - that is, so as to preclude any future reference to the same allegations. Counsel for the objectors argued that, given the passage of time and employee turnover, the union should be required to "re-sign" employees into membership, and should be permitted to file a new certification application only after a six-month interlude. The respondent and the objectors both noted that this proceeding has been outstanding for some time, and that they have been put to considerable trouble and expense responding to the union's application and complaint.

12. It will be convenient to deal separately with the application and complaint - as we did in our brief oral reasons given at the hearing.

### III

13. The purpose of the *Labour Relations Act* is to encourage the practice and procedure of collective bargaining. That purpose is set out in the Preamble to the Act, and is reflected, *inter alia*, in section 3 which guarantees employees the right to join a trade union and participate in its lawful activities. Certification is the mechanism whereby a union can become established as the employees' bargaining agent if that is the wish of the majority of them. Where there is no subsisting collective bargaining relationship, an application for certification can generally be made at any time (see section 5 of the Act).

14. Section 105(2)(i) envisages the possibility of a temporary bar to the exercise of these statutory rights where an applicant has been unsuccessful and the Board, in its discretion, considers such bar to be appropriate. However, the Board has not normally exercised its discretion to impose a bar unless the employees have had the opportunity to express their wishes in a Board-supervised representation vote, or there have been several unsuccessful applications in rapid succession. (See generally: *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 91; *Sonora Cosmetics Inc.*, [1982] OLRB Rep. June 954; *Amarcord Carpenters Ltd.*, [1989] OLRB Rep. June 531; *Southern Express Lines of Ontario Ltd.*, [1988] OLRB Rep. Oct. 1107; and *Mor-Alise Construction Ltd.*, [1977] OLRB Rep. Oct. 668.)

15. Section 105(2)(i) requires the Board to balance the rights of employees to form or join a trade union and the interests of employers (or objectors) to have that matter settled as simply and expeditiously as possible. That is why the Board will almost always impose a bar after a decisive testing of employee wishes in a secret ballot vote, or if there has been a series of unsuccessful applications which have been cumulatively disruptive. In either case, orderly labour relations demands a period of repose. But the Board has been careful not to use its discretion under section 105(2)(i) to unduly circumscribe employee rights or "punish" an unsuccessful applicant - especially when such applicant will seldom have complete information about an employer's organization, and no means of acquiring that information apart from the application itself. In that context, it is difficult to ascribe "fault" for the way in which a proceeding develops - even though the employer will inevitably be put to some inconvenience responding to its employees' efforts to organize themselves. In the instant case, for example, some expense and delay are attributable to the bargaining



unit dispute which was ultimately resolved in the union's favour; but it would be wrong to ascribe "fault" to any of the parties for pursuing this question.

16. After considering the parties' representations, the Board saw nothing in the circumstances of this case which would warrant a departure from its well-established approach to the imposition of a bar. Nor were we persuaded that there is anything which, at this stage, would preclude the applicant from making a new application - provided such application was otherwise timely, and processed in accordance with the Act and Rules. No doubt the employer and the objecting employees have been put to some inconvenience and cost replying to this application and complaint and litigating the bargaining unit question; however, that, in itself, is not a sufficient reason in our opinion to impose a bar pursuant to section 105(2)(i).

17. Counsel for the respondent and the objectors both directed argument to a supposed distinction between a "withdrawal" of a certification application and "dismissing" that application. Quite frankly, in the context of a certification proceeding, we see little distinction between these terms (whatever might be the case in a civil action before the Courts) apart from a literal reading of the words of section 105(2)(i) which appear to require a "dismissal" to confirm the lack of "success" which makes available the Board's discretion to order a bar. The real question is whether the applicant should be permitted to reapply; and for the reasons outlined above, we see no reason why this applicant should not be permitted to do so in the circumstances of this case. Nothing really turns on whether the present certification application is "dismissed" without bar or "withdrawn" without bar, except in the technical sense mentioned above. However, it is customary to "dismiss" the certification application without a bar, and that is what we have done here.

18. Similar observations apply to the union's request to "withdraw" its unfair labour practice complaint, and the respondents' argument that it should be "dismissed", "with prejudice".

19. Since there has been no adjudication on the merits, no findings of fact, no legal determination of the parties' rights, and no Board decision on the validity (or otherwise) of the union's claim, it is doubtful whether any doctrine of *res judicata* would apply if a later complaint is filed relying upon some or all of the allegations raised in this one (see *Becker Milk Company Limited*. [1974] OLRB Rep. Sept. 621). Again, it is difficult to see any distinction between a "dismissal" and a "withdrawal"; moreover, there are good reasons *not* to preclude a party withdrawing a *statutory* claim from later asserting its *statutory* rights. Certainly the statute contains no limitation period, nor is there any Rule that a complaint, once filed, cannot be withdrawn, or can only be withdrawn "with prejudice".

20. On the other hand, under section 91 the Board always has a *discretion* whether to entertain *any* unfair labour practice complaint; and in exercising that discretion, the Board might consider the fact that an earlier complaint had been filed and withdrawn or dismissal, as well as the passage of time between the incidents relied upon by the complainant, and the filing of the new complaint - just as the Board would be reluctant to hear "stale allegations" if only one complaint had been filed. Similarly, the passage of time, or the withdrawal or dismissal of an earlier complaint, *might* be factors for the Board to consider in fashioning a remedy, even if the Board were disposed to entertain a new complaint. However, it is difficult to see why the discretion would be exercised differently only because the earlier proceeding was "dismissed" without a hearing on the merits, rather than "withdrawn", or vice versa.

21. But all of these considerations are matters which would be relevant, if at all, only if a new complaint was filed. At this stage, it is sufficient to rule, as we did, that the complainant union would be permitted to withdraw its unfair labour practice complaint, without prejudice to the positions that *any* of the parties might take if a new complaint is filed. The panel hearing that com-

plaint (if there is one) will determine how its discretion should be exercised in the circumstances then before it.

22. For the foregoing reasons, the Board ruled that the certification application would be dismissed, but without the imposition of any bar pursuant to section 105(2)(i) of the Act, and the unfair labour practice complaint can be withdrawn, with the caveat mentioned in the previous paragraphs.

23. It is inappropriate to comment upon whether in a new certification application the union could rely, on the membership cards filed in this one, or whether evidence which otherwise demonstrates "membership" within the meaning of section 1(1)(l) of the Act, should be given diminished weight because of the passage of time, because it was filed in connection with an earlier proceeding, or for some other reason. Those, too, are matters which can be addressed if another certification application is filed, and if the panel constituted to hear that application is called upon to decide those questions.

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**1989-91-G** United Brotherhood of Carpenters and Joiners of America Local Union 785, Applicant v. **Robertson Yates Corporation Limited**, Respondent v. Labourers' International Union of North America, Ontario Provincial District Council, Intervener

**Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - General contractor subcontracting work to company having collective agreement with Labourers union, but not with Carpenters union - Carpenters grieving against general contractor alleging breach of subcontracting clause - Whether Board should defer consideration of grievance to allow filing and resolution of jurisdictional dispute complaint - Whether Board has jurisdiction under section 93 of the Act - Board satisfied that nature of grievance filed and its having been communicated to the subcontractor, constituting a demand for work within the meaning of s.93(1) and that Board having jurisdiction to entertain dispute as jurisdictional dispute**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*

**APPEARANCES:** *N. L. Jesin* and *Karl Ball* for the applicant; *Walter Thornton* and *L. R. Eller* for the respondent; *Susan Philpott* and *R. Weiss* for the Intervener; *Frank Calvi* for United Flooring.

**DECISION OF THE BOARD;** April 21, 1992

1. This is a referral of a grievance to arbitration pursuant to section 126 [formerly section 124] of the *Labour Relations Act*. The Board is asked to defer consideration of this application to allow the filing and resolution of a jurisdictional dispute, but the applicant objects that the Board has no jurisdiction to deal with the dispute under section 93 [formerly section 91] of the Act.

2. The respondent, Robertson Yates Corporation Limited ("RYCO"), is a general contractor which was hired around December, 1990 to build three additions to the Toyota assembly plant in Cambridge, Ontario. The work was I.C.I. work. RYCO was bound to both the provincial agreements of the applicant, Carpenters Local 785, and the intervener Labourers. Both provincial



agreements apparently contain clauses precluding the general contractor from subcontracting to subcontractors who are not also in contractual relationship with the particular union.

3. The head contract between the owner and RYCO required that subcontracting of certain work be let to United Flooring, and as a result, around June 7, 1991, that type of work was subcontracted to United Flooring. United Flooring has a collective agreement with the Labourers, but not with the Carpenters. Around August 1, 1991, the applicant Carpenters, Local 785 filed a grievance against the general contractor, RYCO, alleging a breach of the subcontracting clause in its agreement, claiming that the nature of the grievance was “subcontracting work of the union ...”, and as remedial relief, seeking certain declarations and “damages to Local 785 for all hours earned due to above violation.”

4. Upon receipt of the grievance, Lawrence Eller, the Vice-President of Field Operations for RYCO, sought advice from a representative of the local association of contractors, the Hamilton General Contractors Association. Mr. Eller also spoke to an official of United Flooring, Frank Calvi, inquiring whether United Flooring would hire a few carpenters. Mr. Calvi responded that United Flooring would not hire any carpenters, as it only had a collective agreement with the Labourers. Further, the work in question subcontracted to United Flooring involved specialty work, and that company needed its existing employees in order to properly perform the work.

5. Subsequently, around August 29, 1991, Mr. Eller met with Karl Ball, the business representative for Carpenters, Local 785. Mr. Ball claimed that the work which had been subcontracted to United Flooring was Carpenters work, and RYCO was therefore in breach of its collective agreement with the Carpenters. Mr. Ball suggested that RYCO should use its own carpenters to perform the work. Mr. Ball did not demand of Mr. Eller, directly or indirectly during this conversation, that RYCO advise United Flooring that United Flooring had to hire carpenters to perform the work. Mr. Ball testified that since the Carpenters did not have a collective agreement with United Flooring, it would have been inappropriate and futile to seek of RYCO a direction to the subcontractor that it switch to carpenters.

6. Shortly after this meeting, Mr. Eller heard from the Labourers union, which advised RYCO that the Labourers would be filing a grievance if the work was subcontracted in any fashion away from its members, which work its members currently were performing for United Flooring. The Labourers relied upon its provincial agreement with RYCO to support its assertion that its members were entitled to the work.

7. Caught between the Carpenters and the Labourers, Mr. Eller sought further advice from the Hamilton Contractors Association. On August 30, 1991, he sent a letter on behalf of RYCO to United Flooring, stating: “Please be advised that the framing of the bulkheads in this contract must be performed by carpenters as per the terms of our subcontract agreement.” But notwithstanding this letter, when Mr. Eller and Mr. Calvi subsequently spoke, Mr. Calvi repeated that United Flooring would not be hiring carpenters, as the subcontractor only had an agreement with the Labourers. The two men then agreed that United Flooring would continue to use labourers. Mr. Eller testified that he agreed to this for two reasons. First, the contract with the owner did not allow RYCO to require that United Flooring work with carpenters, and second, as the Hamilton Contractors Association representative had advised, the Ontario Labour Relations Board would resolve the matter.

8. The issue before the Board is whether the above circumstances can constitute a jurisdictional dispute within the meaning of section 93(1) of the *Labour Relations Act*. The issue at this stage is not how the Board exercises any discretion it might have thereunder or whether the application ought to be deferred to the filing or hearing of a jurisdictional dispute; it is simply whether



the Board has the jurisdiction, should it otherwise decide it is appropriate to do so, to hear the dispute as a jurisdictional dispute.

9. Section 93(1) of the Act reads as follows:

“93.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers’ organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers’ organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.”

10. The Board must find its jurisdiction to entertain a jurisdictional complaint in the wording of the above section. In the circumstances before us, the Board must be satisfied that “a trade union...or an officer, official or agent of a trade union...was or is requiring an employer to assign particular work to persons in a particular trade union...”

11. This is not a novel issue for consideration by this Board. Particularly in recent years, there has been a steadily increasing amount of litigation focusing on the literal wording of this section. This litigation has not revolved around whether a work assignment dispute exists, and if so, whether in the circumstances, the Board ought to exercise its discretion to ensure that a work assignment or work entitlement dispute between two or more unions is litigated under the jurisdictional dispute provisions of the Act. Rather than dealing with the practical realities, the litigation has centred on whether the facts fall strictly within the literal wording of section 93(1). This has been so regardless of whether a dispute of a jurisdictional nature has existed between the unions. This litigation has been expensive, it has substantially delayed the resolution of real and serious work jurisdiction disputes between unions, contractors, and subcontractors, and it has in cases resulted in true jurisdictional disputes being determined outside of the mechanism the Legislature has created for dealing with such matters.

12. Of course, the Board must be satisfied that it has jurisdiction under section 93 of the Act. We cannot consider a dispute under the provisions of section 93 simply because it “makes sense” to do so. To fall within the wording of section 93 in the instant case, the grieving union must have been or still is requiring the employer to assign particular work to it. The Board has regularly interpreted “employer” in section 93(1) to mean that the union must be requiring the assignment from the employer, the company directly hiring and employing employees to do the work in question, in this case the subcontractor United Flooring. See *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247.

13. The nature of the grievance, alleging a breach of the “no subcontracting” clause in the Carpenters’ agreement necessarily implies that the work subcontracted to United Flooring is work that would fall within the parameters of the Carpenters’ provincial agreement, to which RYCO is bound. The grievance is therefore a claim by the applicant union for the work in question. This conclusion is buttressed by the remedies sought by Local 785, damages “for all hours earned due to [the] violation.” The remaining question, and the focus of the issue before us, is whether the Carpenters union is requiring the employer, United Flooring, to assign this work to its members. Carpenters, Local 785 has not asked the general to convey to the subcontractor a demand by it for the work. It has not directly communicated with the subcontractor.

14. The cases on point have considered whether the general contractor can be said to have

acted as an “agent of a trade union”. When the general has passed on the grievance filed against it demanding the work to the subcontractor, together with any sort of indication that the subcontractor should comply with the grievance or in some way change its assignment to the benefit of members of the grieving union, the Board has generally concluded that the demand for the work has in effect been made also of the subcontractor, as the “employer”. Through this “agency” analysis, the Board has concluded that the grievance against the contractor constitutes a demand for the work of the employer, even though the grieving union has no bargaining relationship with the employer (and even though the union’s “agent” has been the party which it is asserting has breached the collective agreement).

15. We do not propose to canvass the “agency” cases here, as we need not resolve the issue before us employing the “agency” analysis. It is not only through such an “agency” that a demand can be found to have been made of an employer. Focusing on the “agency” principle should not obscure the issue. Whether or not the general contractor acts as agent for the trade union in passing on the grievance, the jurisdictional question for the Board to decide remains the same. Has the trade union made a demand of the employer for the work in question, or to use the statutory language, required that the employer assign work to it. In answering this question, one first needs an understanding of the context in which these disputes arise.

16. The nature of the “subcontracting” clause was discussed at some length in *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. November 1022, where the then Chairman of the Board wrote, in part, as follows:

35. In arriving at this conclusion the Board recognizes that, in the context of the construction industry, a sub-contracting clause may serve a purpose parallel to that of the union shop, or union dues provision, in the industrial setting. Both types of clauses can be construed as attempts by trade unions to enhance their strength as collective entities. At this point, however, the comparison ends. Union security in the industrial setting appears to refer primarily to provisions, such as union shop clauses and dues shop clauses, which serve to ensure that all members of the bargaining unit contribute to the financial support of the bargaining agent. In the construction industry, on the other hand, union security appears to be more related to contractual provisions recognizing the union’s claim to particular work, i.e., the sub-contracting provisions. These provisions appear to be primarily directed at preserving a union’s work jurisdiction so that it can continue to provide work for its members. The construction union in so doing is then able to maintain its own strength as a collective entity.

36. The object of a sub-contracting clause is to preserve the work jurisdiction of the trade union which is the beneficiary of the clause. While it may be that a sub-contracting clause, such as the one contained in the MTABA-Council agreement, has a much greater impact than the one contained in the agreement between Local 1 and the MCAT, both share a common purpose - to ensure that any work contracted-out is performed only by members of the union which has obtained the sub-contracting clause. In both cases, moreover, this purpose is carried out by the placing of restraints upon the tendering of sub-contracts, restraints that prevent the members of other unions from gaining access to the work. In the light of these considerations it would not be consistent for the Board to distinguish between forms of sub-contracting arrangements. In the Board’s view, all such arrangements fall outside the scope of section [47(1)(a)], and must find their legal justification elsewhere in the *Labour Relations Act*. If the sub-contracting provision in the MTABA-Council agreement is illegal then so must be the sub-contracting clause in the Local 1-MCAT agreement.

37. The question for the Board to decide is whether the sub-contracting provision in the abstract violates any provision of the *Labour Relations Act*. This appears to be the first occasion when this question has been put directly to the Board, although on other occasions the Board has had to deal with sub-contracting provisions. These previous decisions indicate an implicit recognition by the Board of the legal validity of sub-contracting arrangements. In cases such as *Beer Precast Concrete Ltd.*, [1969] OLRB Rep. Jan. 1108, *Beer Precast Concrete Ltd.*, [1970] OLRB Rep. May 224, *Ellis-Don Ltd.*, [1971] OLRB Rep. Sept. 620, *Abe Dick Masonry Ltd.*, [1972] OLRB

Rep. Jan. 74, *Northdown Drywall and Construction Ltd.*, [1972] OLRB Rep. Jun. 666, *Acme Lathing Co. Ltd.*, [1972] OLRB Rep. Mar. 215, *Donaldson Barron Ltd.*, [1976] OLRB Rep. Dec. 793, the Board was faced with work jurisdiction problems created by sub-contracting provisions and the issues of whether the Board should deal with such problems by applying the jurisdictional dispute procedures now found in section [93] of the Act. While the Board did not apply its jurisdictional disputes procedure in all of these cases, it is clear that the Board regarded the sub-contracting provision in each of these cases as being a legitimate attempt by a union to assert its jurisdiction over particular work. In *Napev Construction Ltd. and Vepan Leaseholds Ltd.*, [1976] OLRB Rep. Mar. 709, moreover, the Board went even further in recognizing the legitimacy of the sub-contracting clause by making it clear that the sub-contracting provisions in a collective agreement could be enforced by a referral under section [126] of the Act. These decisions leave no doubt that this Board in previous decisions has implicitly recognized the legality of the sub-contracting arrangement.

38. This Board's recognition of the legitimacy of sub-contracting clauses is not inconsistent with the manner in which these provisions have been treated in other Canadian jurisdictions. In *R.M. Hardy and Associates Ltd.*, [1977] 2 Can. LRBR 357, the British Columbia Board, speaking to both the sub-contracting clause and the non-affiliation clause (which is not an issue in this case), made it clear that these types of clauses did not amount to illegal coercion under the *Labour Code* of British Columbia. This decision was entirely consistent with an earlier decision in the British Columbia Court of Appeal. In *Canadian Ironworkers Union No. 1 v. International Association of Bridge, Structural and Ornamental Ironworkers Union, Local No. 97* (1970), 70 CLLC, ¶14,053 (B.C.C.A.) all three justices came to the conclusion that the sub-contracting clause did not violate any collective bargaining statute, a view which appears to have been accepted by the Supreme Court of Canada when this decision was appealed (see [1972] S.C.R. 295). This conclusion was later followed in *Canadian Pacific Railway Company and Brotherhood of Railway, Airline and Steamship Workers, Freight Handlers, Express and Station Employees v. Building Material, Construction and Fuel Truck Drivers Union, Local 213 of International Brotherhood of Teamsters*, [1975] 5 W.W.R. 329 (B.C.C.A.). These decisions appear to recognize that the primary purpose of the sub-contracting provision is to protect the work jurisdiction of the union which has obtained such a clause, a purpose not in conflict with any collective bargaining legislation.

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42. Our conclusion that sub-contracting clauses are not prohibited by the *Labour Relations Act* does not mean that such clauses establish an exclusive claim to the work in question. The facts of this case indicate that changing economic conditions have brought the two bricklayers unions into conflict over their respective work jurisdictions. Whereas a few years ago the work jurisdictions of the two unions were more insulated from each other, Local 1 being in what was primarily private residential construction and Local 2 being in primarily industrial, commercial and institutional construction of a non-residential nature, the recent emphasis upon the construction of public housing appears to have caused some overlap in their respective work jurisdictions. This apparent overlap of jurisdiction gives rise to the possibility of an application under section [93] to resolve the competing jurisdictional claims.

43. The Board has made it clear that the enforcement of a sub-contracting clause against a general contractor can be interpreted as a requirement that an employer assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class within the meaning of section [93(1)] of the *Labour Relations Act*. See *Beer Precast Concrete Limited*, [1969] OLRB Rep. Jan. 1108, *Donaldson Barron Ltd.*, OLRB Rep. Dec. 793 and, for a general discussion of what constitutes a jurisdictional dispute, *Eamon Riggs Limited*, [1978] OLRB Rep. Mar. 228. Given the Board's decisions that an attempt to enforce a sub-contracting clause against a general contractor can set in motion the section [93] procedure, it would appear to follow that the natural operation of a sub-contracting clause can also give rise to the same legal result. In other words, once a contract is let pursuant to a sub-contracting clause, then at that point it can be said that a trade union is requiring an employer to assign particular work to persons in a particular trade union rather than to some other trade union, giving access to the jurisdictional dispute procedures under section [93]. The jurisdictional dispute only materializes when the contract is let, as it is at that



point that there comes into existence a particular work assignment flowing from the sub-contracting provision.

17. And in *Pigott Construction Limited* [1990] OLRB Rep. Apr. 441, the Board wrote, in part, as follows:

“30. Having work performed by way of subcontract to trade contractors like the electrical and mechanical contractors on the hospital projects, is fairly typical of building construction in the unionized part of the ICI sector of the industry. That practice results largely from the historical development of a division of labour in the construction industry based on the principle of operational specialization, particularly in the United States and Canada.

31. The effect of the division of labour by trade or craft is clearly visible in the international unions which represent construction tradesmen in Canada and the United States. Approximately 20 of these unions joined together to form the Building and Construction Trades Department of the AFL-CIO. They are known as the building trades unions. Some 13 of these building trades unions have a presence in construction in Ontario. They also are the unions who hold the exclusive bargaining rights for their trades under the province-wide bargaining scheme in the ICI sector. Historically each building trades union has sought to organize all of the employees in its trade rather than all of the employees of an employer, as in the industrial union model. Each claims to itself exclusive jurisdiction in the construction industry for its trade and the work performed by the trade. That is one means by which each of these unions seeks to assure that its members will retain a share of the available work in the industry. These are institutional claims and, while the building trades unions will seek to enforce their claims through protective provisions in their collective agreements, they have used whatever lawful means which they thought would be effective in the particular circumstances. A classic work jurisdiction dispute results when a union perceives “its work” being done by persons other than its members and seeks to change that circumstance by demanding that it be done by its members. Where, as here, it occurs in the unionized ICI sector of the industry, it is a struggle between two or more of the building trades unions over which union’s members will do the work.

32. One of the effects of operational specialization on building construction is visible in the way employers have organized themselves to perform construction work. Typically there are general contractors and trade contractors. A general contractor usually deals directly with the purchaser of construction and takes charge of an entire project. The general contractor may employ bricklayers, carpenters, construction labourers, cement masons (cement finishers), operating engineers and rodmen, but may, and frequently does choose to perform only a limited amount of work with its own employees. Instead it will choose to subcontract packages of work to subcontractors, many of whom will limit the work they take to that which is performed by one or two trades. These are the trade contractors and their specialization is defined by the trades which they employ and, in the unionized part of the industry, by the trade unions representing those trades. In the unionized ICI sector in Ontario, an electrical contractor employing only electricians represented by the IBEW and a mechanical contractor employing only plumbers and steamfitters represented by the UA would be common examples of trade contractors. 16 of the 17 hospital projects in evidence in this proceeding are examples of general contractors subcontracting packages of electrical and mechanical work to electrical and mechanical trade contractors.

33. One of the obvious consequences of such practices is that trade contractors are largely dependent upon general contractors continuing their subcontracting practices. So are the trade unions which represent those trades dependent on the practices continuing for there to be work opportunities for their members, unless, of course, the general contractor employs them directly to do the work. Where, as has happened here, the general contractor assigns work directly to a trade different from the one which would have performed it had the general contractor subcontracted the work, it poses a difficult dilemma for the trade union whose members lose the work opportunity. For example, in the instant case, the real complaint of the IBEW and the UA is with Pigott (and the Carpenters and the Labourers), but they have no collective agreements with Pigott and, therefore, no grievance and arbitration process available to them. The agreements binding on the IBEW and the UA are with electrical and mechanical contractors who likely share with the two unions their interest in retaining jurisdiction over the work in dispute.

When Pigott disagreed with the complainants' claim to the work, they pursued the claim by filing this complaint under section [93] of the Act.

34. Work jurisdiction disputes are a perennial problem for the construction industry. Seen from outside the industry, they appear to be senseless fights between members of the building trades family of unions about which union's members are to get a particular work assignment; or, to put it another way, about which union's members will be employed and which ones will be unemployed. But when such disputes are viewed in the context of the operational specialization prevalent of the construction industry, the claim of jurisdiction over a particular kind of work is but one of several mechanisms relied on by the building trades unions to protect their members' share of the available work. Protecting work jurisdiction claims is an integral part of the union security provisions in construction industry collective agreements. The closed shop hiring hall system and limiting the subcontracting of the claimed work to contractors with whom the union has a collective bargaining relationship complete the protection. This approach to job security might not be acceptable outside of the construction industry, but that is not reason to condemn its use in the industry. Those mechanisms both reflect and attempt to balance the economic and structural forces which operate in the construction industry."

18. Although the province-wide scheme of collective bargaining and trade jurisdiction in the I.C.I. sector of Ontario, set up and circumscribed by the applicable parts of the *Labour Relations Act*, is premised upon particular unions holding the exclusive bargaining rights for their respective trades, the reality is that more than one craft or trade union can reasonably claim to be entitled to perform specific work. The designation system and the provincial units described therein (see section 141 [formerly section 139] of the *Labour Relations Act*) do not create airtight, mutually exclusive, trade jurisdictions. Indeed, numerous designations arguably overlap on their very wording. Even a cursory contact with the construction industry in this sector will amply demonstrate the overlapping jurisdictions of different trades, and the disputes that such overlapping jurisdictions have engendered. This potential for jurisdictional disputes also exists in non-I.C.I. sectors of the construction industry. And, it is quite common for a general contractor or subcontractor to be bound to an agreement with more than one trade, and for each of the applicable agreements to contain restrictions on the ability of the contractor, subcontractor or employer, if you will, to subcontract to companies not also in a contractual relationship with the trade union. Taken together in the context of the industry, given the nature and purpose of subcontracting clauses and that trade jurisdictions can and do overlap, and that contractors may be bound to two or more collective agreements which appear to conflict or overlap in terms of the type of work they cover, jurisdictional disputes are understandably common.

19. That is not to say that contractors, who are bound to agreements with different craft unions which appear to encompass the work in question, ought to be or will be protected by this Board from the consequences of any breach of the collective or provincial agreement affecting the work entitlement of members of a particular trade union. It is only to say that general contractors and subcontractors, along with the craft unions that dominate in the construction sector, are often signatory to or bound to more than one collective agreement which can quite arguably cover the particular work in question. And it is to say that two-party grievances often mask the true three-party dispute at the heart of the matter. And it also can and does mean, in a given case, that a particular union may not be entitled to perform certain work described in its collective or provincial agreement even though the type of work would appear to be covered by the text of the agreement. A two-party grievance cannot best deal with the issue, the work jurisdiction dispute between unions.

20. It is also important to understand the significance of Board decisions that find, implicitly or explicitly, that certain work "belongs" to a certain trade union. Again, it is overlap areas of potential entitlement to work by a trade union that give rise to the overwhelming majority of jurisdictional disputes. When these disputes are litigated, each competing union asserts that past prac-



tice, whether in a particular Board area or for a particular employer, favours the assignment of the work in question to it; that is, in reaching a decision as to the correct assignment, the Board will give significant weight to relevant past practice, including decisions of this Board. Thus, where the Board issues a decision that a certain kind of work is properly the work of a particular union, the Board may well be making a decision having wide precedential impact, affecting further assignments of similar work, perhaps wherever situated in the province. The Board's decision will almost certainly be relied upon in any further work jurisdiction disputes by the successful union. As well, the Board's decision could have significant negative ramifications for the subcontractor awarded the work.

21. Thus, it may not be appropriate to resolve such multi-party disputes in a section 126 application, in which only the applicant union and the respondent company generally participate, and which context deprives the Board of the full panoply of powers and abilities given to it under the provisions of section 93, powers that may be necessary to consider the true issues and to fashion appropriate remedial response. For example, where what is truly a jurisdictional work assignment dispute is litigated in a section 126 application, the issue, at least initially, will be only whether the respondent has breached the "no subcontracting" clause of the provincial agreement. But that issue will likely involve a consideration of whether the work in question is covered by the particular provincial agreement. The grieving union of course asserts this. In order to find a breach, the Board would have to conclude that the work in question that was subcontracted was work covered by the provincial agreement. Thus the grieving union will have obtained a declaration that particular work "belongs" to it or its members. Perhaps the next time, or concurrently in another section 126 application, a different craft union is the applicant in a section 126 application. The second union might well be successful in obtaining a declaration from the Board that the work in question in its section 126 application falls within its agreement or jurisdiction. As discussed above, many types of work can quite arguably fall within more than one collective agreement or more than one trade's jurisdiction. In this piecemeal fashion, a jurisprudence would develop of Board decisions which find work to be covered by many different collective agreements and trades, without any mechanism by which the Board can decide the true issue: in a contest between two or more unions, and in competing claims between two or more unions, where ought the work in question to be assigned?

22. Here it is not simply the question of whether the Carpenters union has filed a grievance against United Flooring. It obviously has not, nor could it. It is not claiming that the subcontractor has breached a collective agreement. Nor is it simply the question of whether the Carpenters are applying direct pressure on United Flooring to redirect the work to members of its union, nor does it matter that the Carpenters have not communicated directly with the subcontractor. On the facts, and having regard to the context, we are satisfied that the Carpenters, Local 785 has made a demand for the work in question of the employer. In practical terms, albeit indirectly, the applicant union is requiring the employer to assign the work in question to it. The grievance itself is clearly a demand by the union for the work in question. Although damages are sought in the grievance, they would only flow if the work was subcontracted in breach of the collective agreement. Implicit in the damages claim is the assertion that the work is carpenters' work covered by the agreement, performed by carpenters. The Carpenters made this clear to RYCO, that the work was theirs. When that grievance was communicated to the subcontractor, the applicant indirectly demanded the work of the employer. This remains so even though neither the general contractor nor the grieving trade union has directly put pressure on the subcontractor to comply with the grievance demand or to somehow redirect the work. What matters is that, because of the way the construction industry works in this province, the demand for the work by the union was for all practical purposes a demand made of the employer, United Flooring. In this respect, it is worth noting that both United Flooring and the Labourers' recognized that a demand for the work was



being made upon United Flooring. The grievance prompted the Labourers' to put RYCO on notice that it would file a grievance if the work in question was removed from its members.

23. The grievance may lead to a decision that the work is covered by the Carpenters' collective agreement. If this should occur, the ability of the subcontractor to obtain further work in the area may be immediately and negatively affected. In these circumstances, it would be ignoring reality to conclude that the applicant Carpenters are in no way demanding this work "of the employer". The pressure on the subcontractor, and the risks to it of a decision that the work in question "belongs" to the other union, still exist even though neither the general contractor nor the subcontractor expect that the assignment that is the subject of the grievance will be changed in response to the filing of the grievance, and its communication to the subcontractor.

24. This is not the first time that the Board has taken this approach. In *Pre-Con Company, A Division of St. Marys Cement Limited* [1981] OLRB Rep. July 947, the Board wrote, in part, as follows:

"17. We turn now to the second and third arguments made by the Carpenters which is that the Carpenters are not directly requiring Pre-Con to assign work to the members of the Carpenters Union, nor are they indirectly through Harbridge and Cross as their agent, requiring Pre-Con to assign the work to members of the Carpenters Union. While there may have been evidence that the Carpenters were directly requiring Pre-Con to assign work to members of the Carpenters Union through the conduct of Mr. Grisolia, it is not necessary for us to make a finding in this regard. We are clearly of the view that the Carpenters through their grievance against Harbridge and Cross intended to put "pressure" on Pre-Con to assign such work to Carpenters. Clearly, in filing the grievance against Harbridge and Cross, the Carpenters are seeking the assignment of certain work, and it is naive to suggest that Harbridge and Cross would sit idly by and not transfer this request to Pre-Con. Harbridge and Cross' transference of this request to Pre-Con through its letter referred to in paragraph 11 above, was applying precisely the kind of "pressure" that the Carpenters wanted applied on Pre-Con. In that sense, Harbridge and Cross is acting as the "agent" making a requirement on the Carpenters behalf, directly to Pre-Con. This is precisely the manner in which Pigott Construction acted as the agent for the Ironworkers in the *Beer Precast* case, (*Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, structural & Ornamental Iron Workers, Local 736* [1969] 1 O.R.405), in which the Ontario Supreme Court found that Pigott acted as agent for the Ironworkers within the meaning of section [93] of the Act.

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20. Of particular concern in the present dispute is the matter of conflicting provincial collective agreements binding upon a general contractor. We are of the view that where the contractor is bound by such completely conflicting collective agreements, and an attempt is made to enforce those agreements, that that is *prima facie* a jurisdictional dispute. This is particularly so in the present case where the general contractor bound by such conflicting provincial agreements puts pressure on the subcontractor actually employing the men. We are prepared to view that as "requiring" the subcontractor within the meaning of section [93(1)]. Not only are we satisfied that the Board has the jurisdiction to entertain such complaints under section [93], but such a procedure affords all of the affected parties an opportunity to protect their interests, and section [93] gives the Board the broad powers to develop an appropriate labour relations remedy. In the circumstances the Registrar is directed to list this matter for continuation of hearing."

25. The Board there concluded that when a contractor is bound by conflicting collective agreements, and an attempt is made by a union to enforce those agreements, *prima facie* a jurisdictional dispute exists.

26. In *Harold R. Stark Company Limited* [1982] OLRB Rep. Feb. 222, the Board commented upon paragraph 20 of *Pre-Con*, as follows:

"15. ...In view of the Board's conclusion that the Carpenters' union had used the general contractor as its agent to require that Pre-Con assign the work to carpenters rather than to labourers, this comment was unnecessary to the result. Further, the comment was made in the context of, and referred to, a general contractor putting pressure on the subcontractor actually employing the men doing the work, which is not the situation before us. Given the specific context in which the statement was made, we doubt whether the Board in the *Pre-Con* case meant to indicate that in every case where an attempt is made to enforce a subcontracting provision which conflicts with a similar provision contained in another relevant collective agreement, section [93(1)] automatically becomes applicable. Indeed, in our view, the wording of section [93(1)] simply does not support such a general conclusion."

The Board in *Stark* concluded that the wording of section 93(1) precluded the Board from dealing with the dispute under that section. In response to concerns that the true jurisdictional dispute could not be properly dealt with, the Board wrote:

16. In their submissions, the parties, other than U.A. Local 463, clearly indicated their concern that if this matter could not be dealt with under section [93], then it would be dealt with in a section [126] arbitration proceeding where the root jurisdictional issues would not likely be fully addressed. This is an understandable concern. However, such a concern cannot be a basis for giving section [93(1)] a meaning not contemplated by the statute. It may be that the concerns expressed about having what is essentially a jurisdictional matter dealt with at arbitration can in fact be dealt with in the context of the Board fashioning a remedy in the section [126] arbitration proceeding, assuming, of course, that a violation of the subcontracting provision in the applicable collective agreement is made out. Can it be said, for example, that a construction trade union has properly sought to mitigate the damages in circumstances where it is alleging a violation of a subcontracting provision, but at the same time has refrained from seeking an assignment of the work from the employer actually responsible for assigning it. Similarly, it may be open to question as to whether in a section [126] proceeding any order should go requiring an employer to cease subletting certain work to a firm employing members of one union, and requiring him to do it himself or have it done by another contractor using members of the grieving union, in circumstances where although the matter arises out of a jurisdictional dispute the grieving union has not brought the matter within the provisions of section [93] so as to allow the jurisdictional issues to be properly canvassed and ruled upon. This is particularly so in light of the fact that the subcontractor and the union whose members are actually performing the work will likely not have standing to participate in the section [126] arbitration proceedings. We raise these issues only as matters which perhaps should be addressed at a later time, and reach no conclusions with respect to them."

The Board in *Stark* recognized that the dispute before it was jurisdictional in nature, over the correct work assignment, but felt constrained by the statutory language. Decisions before and after have continued to take different views. The jurisprudence has remained inconsistent, and litigation over the *jurisdiction* of the Board has continued to occur with increasing frequency. The real issue between the parties gets delayed while this preliminary jurisdiction issue gets litigated.

27. With respect, in our view, the Board will generally have jurisdiction under section 93(1) when a grievance or application under section 126 of the Act, filed by a union against the general contractor, alleges a breach of the "no subcontracting" clause, and the grievance or demand is communicated to the subcontractor. This will generally be so even when the subcontractor does not have a bargaining relationship with the grieving union. Although not a demand made directly by the grievor of the "employer", and although not a claim that the subcontractor has breached any collective agreement, given the way in which the construction industry operates, both in practice and as structured by the relevant legislation, the grieving union has made a demand for the work in question, the demand is made of the employer, and the grieving union is in practical terms requiring of the employer that the work be assigned to it.

28. In the recent unanimous decision of the Board in *Foundation Company of Canada Limited* [1990] OLRB Rep. May 521, the facts were similar to those before us. The Board in

*Foundation* noted that when the general contractor conveyed the grievance to the subcontractor, the general did not expect that the subcontractor would comply with its request that the assignment or hiring by the subcontractor be changed. The Board found it hardly surprising, then, that the assignment was not changed by the subcontractor. This is true here also. The grieving union in that case, again as in ours, did not directly deal with the subcontractor. As the Board stated at paragraph 13 therein:

“13. In determining on the facts before us that Foundation was acting as agent for the Ironworkers, the Board has adopted the general approach of the *Pre-Con Company* decision. In our view, the general position of the Ironworkers was that it wanted its members to perform the work in dispute. Although its representations to Foundation indicated that it wanted to obtain the work in dispute in a particular way, the Ironworkers’ ultimate goal was to obtain the work in dispute. In response to receiving the Ironworkers’ grievance, Foundation directed Duron to employ Ironworkers to perform the work in dispute. In effect then, Foundation’s response to the grievance was to make a direction to Duron consistent with the ultimate object of the Ironworkers.”

Recent jurisprudence of the Board recognizes this more realistic approach: See in this regard, for example, *Schindler Elevator Corporation* [1990] OLRB Rep. Oct. 1092; *Vic West Steel Limited* [1991] OLRB Rep. Jan. 111; *PCL Constructors Eastern Inc.* [1991] OLRB Rep. Mar. 354.

29. If Carpenters, Local 785 had requested of United Flooring that the work should go to its own members, there would be no question that the technical requirements of section 93 had been met. That, of course, did not happen. But why should the jurisdiction of the Board be any different, given the wording of section 93, merely because there was no direct request by the grieving union of the subcontractor? Or why should the Board’s jurisdiction depend on whether real pressure is put by the general on the subcontractor to change the assignment? The nature of the underlying dispute will not have changed, nor will the fact that all the players have the same interest in the result, including the subcontractor and its union. The potential effects of a Board decision on future work assignments or jurisdictional disputes will remain the same.

30. To summarize, we are satisfied in the circumstances that the nature of the grievance filed, and its having been communicated to the subcontractor, United Flooring, constituted a demand for the work by the trade union of the employer within the meaning of section 93(1) of the Act. Accordingly, we are satisfied that the Board has the jurisdiction to entertain the dispute as a jurisdictional dispute under the provisions of section 93.

31. This conclusion should not be taken as a comment on how the Board will, either here or in any case, exercise its discretion under section 93(1). Our decision is only that we *have* a discretion to hear the dispute as a jurisdictional complaint, because the facts fall within the ambit of section 93. The effect of our decision, it is hoped, will be to reduce or eliminate in the future the type of litigation that has been occurring, over whether a demand for the work has been made of the employer within the meaning of section 93. Litigation will no doubt continue to result over whether the particular dispute in the section 126 application is better dealt with under the jurisdictional complaint provisions in section 93, by deferring the section 126 application to allow a jurisdictional dispute to be filed, or by adjourning the section 126 application to be heard together with any jurisdictional dispute that has been filed.

32. Jurisdictional disputes before the Board are expensive and time consuming. In recent years the Board has tried to reduce the incidence of such complaints and the expense of litigating them, both in terms of financial cost and the prejudice caused by delay. The prehearing conference, with the requirement for extensive prehearing briefs, is one approach adopted by the Board. Recent jurisprudence illustrates the reluctance of the Board to allow the escalation of grievances to



jurisdictional complaints under section 93, unless or until it is appropriate to do so. See, for example, *Schindler Elevator Corporation*, *supra*; *Vic West Steel Limited*, *supra*; *PCL Constructors Eastern Inc.*, *supra*.

33. In *Ontario Hydro* (unreported, December 20, 1991, Board File No. 2627-90-G) the Board dealt with, amongst other matters, whether a section 126 application ought to be deferred to the filing of a jurisdictional dispute. As the Board wrote:

2. The application was filed on January 10, 1991, alleging two different breaches of the collective agreement; that the respondents Hydro/EPSCA breached the agreement first, in their failure to hold a mark-up meeting, and second, in their failure to employ members of the applicant to perform the work in question. These two matters, the "mark-up" aspect and the "work assignment" aspect, were severed by the parties, and the case initially proceeded solely on the basis of the alleged breach with respect to the mark-up meeting. At a hearing on June 20, 1991, Minutes of Settlement were filed by the parties with respect to the mark-up grievance. The Board's decision of July 16, 1991 reflected their agreement and held that Hydro had breached the collective agreement in its failure to hold a mark-up meeting. In response to the request of the applicant, the Board convened a further hearing to deal with the remedial aspects arising from this finding. This decision deals with those remedial matters.

3. The work in dispute involved the construction of several Quonset huts, which Hydro awarded to the Iron Workers, Local 736. The applicant Sheet Metal Workers, Local 537, argued that damages flowed from the breach, the failure to hold the mark-up meeting. It submitted that the Board could determine the quantum of damages without actually determining whether the assignment in question had been correctly made. It asserted that the correct basis for determining the damages for the breach was for the Board to determine the probability that the Sheet Metal Workers would have been successful, had the mark-up meeting been held, in obtaining the assignment of the work in question. If the Board were satisfied, after evidence and argument on this issue, that there was (for example) a 50% likelihood that the assignment would have been made by the employer to the Sheet Metal Workers, then the Board ought to award to the applicant damages at the level of 50% of the amount that the Sheet Metal Workers would have received had they actually performed the assignment in question. Damages awarded on this theory would, it was submitted, reflect the "loss of opportunity" due to the failure to hold the mark-up meeting, and would appropriately attempt to compensate for the effect of the breach.

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8. In response, Hydro/EPSCA argued that damages for its breach would only flow if the applicant would in fact have received work through the original assignment, after a mark-up meeting had been held. The Board must utilize the best mechanism or procedure for assessing those damages. The respondents asserted that a jurisdictional dispute under section [93] is the appropriate mechanism, and that this section [126] application ought to be deferred, to allow the Sheet Metal Workers to file a jurisdictional dispute, and if it should fail to do so, the applicant ought to be deemed to have abandoned its claim to damages in respect of the failure to hold the mark-up meeting.

9. The respondents asserted that the jurisdictional dispute is the appropriate mechanism for several reasons. First, the real dispute between the parties was the correctness of the work assignment, and that is precisely what jurisdictional disputes are designed to resolve. Second, a jurisdictional dispute would involve the participation of, and a decision would bind, all the interested parties, including the Iron Workers, which were assigned the work. Third, there are pre-hearing procedures, including pleading and disclosure requirements, that apply in jurisdictional disputes and which assist the parties and the Board in the resolution of these disputes. Those procedures are not part of a section [126] proceeding. Fourth, the Board has expanded powers under the provisions of section [93] which are not available to it in a section [126] application, but which are necessary and appropriate in order to reach a true resolution of a work assignment dispute. Hydro/EPSCA also submitted that the jurisdictional dispute was more appropriate because the evidence that would be led to determine the chances of the Sheet Metal Workers having received the assignment after a mark-up meeting would be substantially the same, if not identi-

cal, in both the section [126] remedial hearing and in the jurisdictional dispute. It made no sense, it was submitted, to have two proceedings continuing with similar evidence.

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14. But what is the appropriate procedure for litigating the question of damages? Approximately nine months have passed since the filing of the section [126] application. No jurisdictional dispute complaint has yet been filed by any of the interested parties. Both unions have indicated that they are not interested in and are not intending to file a jurisdictional dispute. The breach for failure to hold the mark-up meeting was agreed to at the hearing on June 20, 1991, and reflected in the Board's decision of July 16, 1991, approximately three months prior to the instant hearing. No jurisdictional dispute was filed in this interval. Damages can arguably flow from the breach so found. While there could be a substantial overlap between the evidence in a jurisdictional dispute, involving the correctness of the particular work assignment, and the evidence with respect to the damages for the failure to hold the mark-up meeting, the issues in the two are not the same. The issue before us is to assess the loss, if any, that the applicant suffered because the required mark-up meeting was not held. This involves determining, on the balance of probabilities, what assignment the employer *would* have made had a mark-up meeting been held. That is not the same as the issue in a jurisdictional dispute, determining the correct assignment in all the circumstances. Even if a jurisdictional dispute complaint did determine that Hydro made the correct assignment, damages still might flow to remedy its breach of the collective agreement, its failure to hold the mark-up meeting. And the fact remains that no jurisdictional dispute has been filed, although there has been considerably more than ample time for any of the parties to do so.

15. In these circumstances, we are not prepared to defer this section [126] proceeding, insofar as it relates to the mark-up meeting. If any of the parties had wanted to file such a dispute, they could have and should have done so long before now. To now defer the section [126] application would only serve the purpose of further delaying the section [126] application. We are also loathe to encourage the filing of a jurisdictional dispute, after such a long period, where none has been filed. These parties, for their own purposes, have each chosen not to file a jurisdictional dispute. They have each independently concluded that a jurisdictional dispute complaint, with its attendant costs and delays, is not the appropriate mechanism for resolving the dispute. There is no work assignment dispute that the parties have chosen to submit to a jurisdictional complaint resolution mechanism.

16. That is not to say that a work assignment dispute does not exist; indeed, the deferred part of the grievance is over the work assignment. It is only to indicate that to date the parties have not elected to have the Board resolve that dispute through a jurisdictional complaint. And as noted, the issues are not identical in the mark-up grievance and the work assignment dispute. In these circumstances, we are unwilling to defer a section [126] application that is designed to expeditiously, and relatively inexpensively, resolve a dispute between parties in the construction sector. We are not dealing with a situation where a jurisdictional dispute had been filed in a prompt fashion. In this respect, see the decision of the Board in Board proceeding #1578-91-G, August 28, 1991, unreported, the "Bendel" decision, and the decision of November 20, 1991, denying the request for reconsideration. In that proceeding, the Board deferred the section [126] application, pending the outcome of the jurisdictional dispute, which dispute had been filed prior to the filing of the section [126] application. That circumstance distinguishes the two scenarios.

34. Similarly, where matters are best resolved in the relatively quick and inexpensive section 126 application, the Board will continue to do so. Jurisdictional complaints should remain reserved for those areas of dispute between two or more trade unions, with respect to their work jurisdictions where each union has a credible basis on which to assert a claim for the work. Parties (whether the competing union, the general contractor, or the subcontractor, as the case may be) asking that the Board defer or adjourn the section 126 application must do more than simply claim that the work is or was properly assigned to the union that received it (the non-grieving union). They must also satisfy the Board that, the basis of their claim is sufficient to cause the Board to defer the section 126 application to the jurisdictional complaint procedure. Failing this, the Board

may well decide that the section 126 application should proceed. There may also be other reasons that lead the Board not to defer, as evidenced by some of the cases cited above.

35. Again, this decision deals only with whether the Board has the jurisdiction to exercise its discretion under section 93, and not whether or how that discretion ought here to be exercised. In this respect, the parties have not had full opportunity to address this issue, nor the related issue of whether the matter is in any event inarbitrable. We do note that the intervener Labourers has apparently filed a jurisdictional dispute. This matter will be relisted before the instant panel to deal with the two outstanding issues noted above in this paragraph, and any other preliminary matters.

36. This matter is referred to the Registrar.

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### **3139-91-R Practical Nurses Federation of Ontario, Applicant v. South Muskoka Memorial Hospital, Respondent**

**Bargaining Unit - Certification - Board reviewing and applying *Mississauga Hospital* case - Union's proposed bargaining unit, comprised solely of those employed as Registered and Graduate Nursing Assistants, found to be appropriate for the purpose of section 6(1) of the Act - Certificate issuing**

**BEFORE:** *M. G. Mitchnick*, Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

**APPEARANCES:** *Michael A. Church*, *Otalene Shaw* and *Faye Green* for the applicant; *Allan O. Shakes*, *Sandra Wilson* and *Garth Johns* for the respondent.

**DECISION OF CHAIRMAN M. G. MITCHNICK AND BOARD MEMBER J. REDSHAW;** April 22, 1992

1. This is one of several applications recently brought before the Board by the Practical Nurses Association of Ontario, seeking to be certified as bargaining agent for a unit composed solely of "Registered Nursing Assistants" (hereafter referred to by their traditional acronym of "RNA's"). The Board has already had an opportunity to address this question in considerable depth in the *Mississauga Hospital* case, released on December 5th, 1991 (not yet reported) [now reported at [1991] OLRB Rep. Dec. 1380], and the applicant relies upon that case as having essentially determined the issue. Since the *Mississauga Hospital* decision, there have been two applications brought by the applicant Professional Nurses Federation of Ontario in which a bargaining unit consisting solely of RNA's has been accepted by the Board on the agreement of the parties. See *Pembroke Civic Hospital*, Board File No. 2977-91-R, decision dated January 2, 1992; *Victoria Order of Nurses - Metropolitan Toronto Branch*, Board File No. 1214-91-R, decision dated February 6, 1992. The present respondent, on the other hand, does not view *Mississauga Hospital* as in any way near as determinative, and points out that, if it is going to be followed at all, it is a decision which the Board on the very face of the decision made clear was to be seen as "fact-specific". And in that regard, the respondent continues, there are some significant and obvious differences between the situation before the Board here, and that which pertained in *Mississauga Hospital*.

2. The present respondent is a relatively small hospital, employing a total of some 317 staff persons - all of them as of the date of this application being unorganized. Of those there are some



90 “registered and graduate nurses”, for whom the Ontario Nurses Association has an application for certification pending before the Board. It is not disputed that an appropriate bargaining unit for RNA’s here would include both full-time and part-time staff, so that the total number in the bargaining unit being sought to be represented in this application by the applicant is, by the Board’s count, 43 (for whom, the parties are aware, the applicant has sufficient evidence of membership before the Board to be certified without a vote). The respondent, on the other hand, seeks to add all of those persons who normally would be considered to be part of a “service” unit, comprised in the main here of some 50 housekeeping and dietary staff, plus small numbers of persons in each of the classifications of Orderly, Nurse’s Aide, Cook, Groundskeeper, Storekeeper, Maintenance and, if not considered part of the “paramedical” group which the respondent excludes, Pharmacy Technicians, for a total proposed unit of 115.

3. Factually there was virtually nothing in dispute between the parties. The applicant once again as background to this application relies on the evolution of the qualifications and responsibilities of the RNA as set out by the Board in the *Mississauga Hospital* decision, together with the explanation therein of the how the present “collective-bargaining arm”, the applicant Practical Nurses Federation of Ontario, came into being. The *Mississauga Hospital* decision noted:

14. The applicant is a newly created trade union organized to represent all registered practical nurses or registered nursing assistants and other allied personnel eligible for collective bargaining in Ontario. Over the years at various health-care institutions local organizations of registered nursing assistants have been created. However this would appear to be the first organization of RNA’s which would purport to encompass the provincial jurisdiction. The history leading to the creation of the applicant follows somewhat the development of trade union representation of nurses in Ontario. The Ontario Association of Registered Nursing Assistants (OARNA) has existed to represent the professional interest of RNA’s in the province for some time. The employment of individuals as RNA’s (or certified nursing assistants) has existed since the late 1930’s and over the years standards and criteria have been developed with respect to education and the performance of the work. In 1963 the College of Nurses of Ontario was created to formulate and regulate the standards of practice of both nurses and nursing assistants in Ontario. Over the years within OARNA there has been considerable discussion about the creation of a separate trade union entity to represent RNA’s in collective bargaining. Just one example occurred in 1980 when a group of RNA’s sought legal advice through the auspices of OARNA as to the likelihood of obtaining representation rights for a bargaining unit comprised solely of RNA’s. They were advised that their chances were not good in light of a number of earlier decisions of the Board to that effect.

15. RNA’s expressed opposition to the Steelworkers campaign at Mississauga Hospital on the basis that they did not feel they had issues in common with the other employees in the service unit. While some of this was based on the view that they are “professionals”, there is also a sincerely held belief that issues of their own concern have not been adequately represented as part of the larger service unit. More recently, there have been changes in the Standards of Practice formulated by the College of Nurses of Ontario resulting in RNA’s performing some tasks previously performed only by RN’s. The focus of the standards has shifted to recognize that the RN and RNA, while working interdependently in the provision of health care, also work independently. The standards are now structured to outline the minimum skill expectations of RNA’s and RN’s while also recognizing that individuals may perform at a higher skill level where appropriate. Currently a major review of the legislation applicable to the self-regulating health care professions is underway. Representatives of the applicant anticipate that new legislation will recognize additional self-regulating health care professions (for example, midwifery) and will rationalize the legislation currently affecting others. In combination these factors have increased the RNA’s appetite for collective bargaining outside the service unit and through the auspices of their own trade union and the Federation was created in February 1991.

The applicant in regard to the foregoing stresses that the RNA’s and the RN’s are part of a team which, under the supervision of a medical practitioner, provide direct nursing care to patients; the applicant goes on to note that both professional groups are licensed and supervised by exactly the

same body, the College of Nurses, that both are governed by exactly the same Rules established by the College, and that over the years the gap between the RNA's and the RN's in both standards of qualification and responsibilities has narrowed, to the point where it is no longer appropriate to say that the RNA's natural affinity for collective-bargaining purposes is with the traditional "service" unit. In that same regard the applicant points to page 7 of the *Standards of Nursing Practice* published by the Ontario College of Nurses, wherein it is stated:

**What is the difference between the role of the RN and the role of the RNA?**

Nursing is one discipline with two categories of practitioners: registered nurses and registered nursing assistants. RNs and RNAs study the same body of knowledge, but RNs study it in greater depth and breadth. RNs and RNAs practise independently; they also practise in collaboration with one another and with other health-care workers.

RNs and RNAs both provide care to clients who are individuals or groups of individuals, including family members and significant others. The clients of RNs may include, in addition, family units, groups, or communities.

RNs are able to practise independently in all client situations and to provide consultation and intervention in client situations that are beyond RNAs' scope of competence. RNAs are able to practise independently when the client's condition is common enough that the outcome is predictable, allowing the RNA to implement pre-set care plans that include a limited range of interventions. RNAs seek the collaboration of RNs in client situations that are beyond this scope. RNs may delegate or assign tasks to RNAs or to other health-care workers.

All RNAs and RNs are accountable individually for their decisions and actions, even when they act interdependently, in consultation and collaboration with other members of the health-care team.

That, the applicant submits is clear evidence of the fact that *the College* simply views these two nursing groups as one discipline having two categories.

4. Within the present hospital as well, the applicant asserts, the RNA's entire community of interest lies with the Nursing Department, made up of the RN's, the RNA's, 2 Nurses' Aides, and 2 (soon to be 1) Orderlies. All of those employees, and no one else, bear name-tags stating "Nursing Department", and all report to and are disciplined by the Director of Nursing. These employees and no one else, the applicant submits, are engaged in the hospital administering direct "nursing care", under the supervision of a medical practitioner or an RN co-ordinator, of the patients. Like the RN's, the RNA's have to cover the Hospital 24 hours a day, 7 days a week, and they are the only other group to the RN's which are scheduled to work a midnight shift (also like the Nurses, this scheduling is primarily done by way of 12-hour shifts). Whereas the service employees are provided with uniforms where required, the RNA's, like RN's, are obliged to provide their own. When the hospital 3 years ago set up a hospital-wide Communication Group, it set up at the same time a sub-group called the Nursing Communication Group, made up of both an RN and an RNA from each of the units within which they work (the Aides and Orderlies have no separate representation on the Group). That Group takes its concerns exclusively to the Director of Nursing, and the bulk of them are dealt with solely within the Department. Communication by the higher levels of the administration is in fact commonly directed solely to the employees of the "Nursing Department". The one place where the RNA's *are* dealt with in line with the "service" employees and not the RN's is on adjustments to salaries and benefits, but that is because it currently is the SEIU and CUPE "service" agreements that provide a referable classification, whereas the RN's have their own agreement which provides a direct comparison. Even with that, the applicant adds, however, the employer in its Pay Equity Plan dealt with the RNA's as a classification separate and apart from the broader "service" group.



5. The applicant notes that the Hospital already is checking off membership dues for the Practical Nurses Association for all employees who ask it to do so. There are in fact a number of employees holding an RNA certificate in the Hospital who are employed in other capacities, and 3 of these currently fill in as part-time RNA's on some shifts, one on a regular basis, and the other two more occasionally. Addressing the analysis of the Board in *Mississauga Hospital*, the applicant acknowledges that there have been some employees who moved from another capacity in the Hospital to an RNA position, but adds that the last time that that happened was 14 years ago. And that was at a time when individuals could achieve their RNA certificate through a part-time course while working, a situation which is no longer in place in the Muskoka area. Rather, anyone interested in advancing to the RNA classification now would be required to step away from day-time employment and take a one-year course full-time at the community college. There are currently no employees at the Hospital in the course of achieving their RNA certification, and the 2 remaining Nurses' Aides (a classification the applicant asserts is in the process of being phased out in the industry, in favour of RNA's) were employed back in the 70's when it was possible to take the credits part-time, but chose not to do so. As for employees in other positions in the hospital holding the RNA certification and working in the latter capacity on a part-time basis, the applicant observes that it would simply represent them like any other part-time employee, when and if they worked shifts in the RNA classification.

6. Following that recitation of the facts, the respondent acknowledged that there was, without question, a much closer community of interest here for the RNA's with the RN's in the Nursing Department than with the "service" group. At the same time, however, the respondent pointed out that there was *another* group which fell somewhere in between, and that was the paramedical group. And in that regard the respondent noted that the *Health Disciplines Act* currently requires pharmacists to be certified as well, and that legislation was pending to extend that to other groups such as Registered Technologists, X-Ray Technicians, Physiotherapists, and others. The respondent acknowledged that the RN's and RNA's are the only ones who supply direct nursing care at the Hospital, but pointed out that they are the only ones permitted by regulation to do so. Similarly, states the respondent, the 7 days a week, 365 days a year are simply the way nursing care is. And again, it is natural for all of these nursing-care staff to seek to have their concerns addressed within the department, through the Nursing Communication Group; but, adds the respondent, there is no suggestion that they would deal with "labour-relations" matters there, such as bargaining salaries and benefit levels. The Pay Equity Plan, the respondent notes, was a mandatory requirement of the legislation, and the RNA's got a larger adjustment than others because their male comparator was found to be the Assistant Maintenance Chief classification.

7. The respondent adds further that, however far back, there has in fact in the past been progression through other classifications like dietary aide into the RNA classification, and that, though no examples exist currently, an individual *can* go back to school for the certificate, and continue to work part-time at the Hospital. And in addition to that, the respondent notes, employees do continue to move *out* of the RNA classification and into service or Technician classifications, primarily to avoid the shift-work. As for the deduction of Association dues, the respondent states that this is something that it has been doing for some time as a result of letters of request sent to a variety of hospitals, just as it has been doing for the Nurses' Association. And again, while insurance benefits are uniform across the Hospital, a difference exists between the RNA's and the RN's in areas like week-end and shift premiums, in light of the fact that for the RNA's the employer tracks the SEIU and CUPE agreements, and for the RN's the ONA agreement.

8. In argument, the applicant essentially relies, as noted, on the decision of the Board in *Mississauga Hospital*. As for the "specific" facts here, the applicant submits that there are a num-



ber of parallels with the *Mississauga* case, and that there is nothing whatever to indicate that a bargaining-unit composed of this group alone would cause serious labour-

relations problems for the respondent. The RNA's obviously constitute a homogeneous group for bargaining, and include in total approximately 50 of the staff persons employed by this Hospital. The applicant acknowledges that a community of interest exists with the Nurses in the Nursing Department, but adds that this group cannot be part of that; in the circumstances, therefore, the bargaining unit being sought by the applicant is the next best thing. On the other hand, for the Board to insist on the RNA's being part of a broader "service" unit will likely result in their being denied access to collective-bargaining indefinitely. And as for the respondent's reference to the "paramedical" group, the applicant simply notes that that has nothing whatever to do with the position the respondent has adopted as the appropriate bargaining unit in the present case.

9. The respondent begins its argument by emphasizing that the issue before the Board is that of an appropriate *bargaining unit* - not how closely the RNA's or anybody else *work* together. What this Board has to consider, therefore, is whether *bargaining* for this group alone can be handled, and handled well - particularly considering the fact that history has shown that this group has been ably represented in a service unit. The respondent notes that prior to the *Stratford General* case, [1976] OLRB Rep. Sept. 459, there really had been a proliferation of bargaining units in the hospital field, including:

lab technicians only

or

lab and radiology

stationery engineers

service (with and without RNA's)

some separate RNA units

office and clerical

Since *Stratford*, the respondent submits, however, the Board has confined itself to:

nurses

service

paramedical

office and clerical.

That approach, the respondent states, can be seen in *Kidd Creek Mines*, [1984] OLRB Rep. March 481 and *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. The respondent adds that even before *Stratford General* the Board had twice declined to accept a bargaining unit composed solely of RNA's. See *Essex Health Association*, [1967] OLRB Rep. Nov. 716; *St. Joseph's General Hospital*, [1968] OLRB Rep. Sept. 558 (as noted in the *Mississauga Hospital* case). And that is something, the respondent submits, that the full industry, including the Unions, have come to rely upon; if the Board is departing from that long-standing practice, the respondent submits, both the Hospitals and the Unions should be so informed, so that appropriate steps can be taken to respond

to such applications - perhaps, for example, asking for inclusion in a paramedical unit, or, up to a few days prior to the present application at this Hospital, nurses.

10. The respondent in its argument noted as well that the Ministry of Labour in November of 1991 published a "Discussion Paper" for Reform which listed as a "Preferred Option" the need to facilitate access to collective bargaining by the acceptance of smaller bargaining units. The respondent suggests, however, that it would be improper for the Board to consider the need to grant such access, prior to any legislative changes taking place. On the contrary, the respondent notes that the Johnston Commission on hospital industry bargaining, in seeking a format for province-wide or centralized bargaining, recommended that bargaining units in the sector be confined to:

service

nursing

and paramedical.

The cost of bargaining with a number of small units, including the potential of several within the current "paramedical" grouping, would be extremely onerous for a Hospital this size. And what, the respondent adds, would be the likelihood of province-wide bargaining coming out of a unit comprised solely of RNA's? Apart from such considerations of the cost of bargaining itself, the respondent also raises the concern that a proliferation of small bargaining units could mean "leap-frogging" with respect to the results. Here, says the respondent in sum, the RNA's have never been treated as a separate group in themselves, but rather have in fact been treated as simply part of the broader service unit with respect to salary and benefit levels, and there is simply no reason for the Board to conclude that the approach taken in the *Mississauga Hospital* case is the appropriate one.

11. The kinds of concerns being expressed by the respondent obviously are not unique to Ontario. Indeed, we note, as the parties are no doubt aware, that this very question of appropriate bargaining-unit configurations in the health-care industry has only recently formed the subject of a lengthy and highly-charged public inquiry in the country to the south of us. The background to that public inquiry was the removal by the U.S. Congress in 1974 of the exclusion of non-profit hospitals from the scope of the *National Labor Relations Act*. At the same time, in recognition of the concerns that were articulated in the debate surrounding that legislative amendment, both the House and Senate Committee Reports on the legislation expressed a caution to the Board that "due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry". From there until the early 1980's, the Board carried out its assigned task by recognizing in most acute-care hospital situations anywhere from 5 to 7 appropriate bargaining units, made up of physicians, registered nurses, other professionals, technicals, business-office clericals, service and maintenance, and skilled maintenance employees. See, for example, *St. Francis Hospital* (1982), 265 NLRB 1025, 112 LRRM 1153. Subsequently, a differently-constituted Board generally came to reduce that number to 3 (all "Professionals", Service and Maintenance (or "non-professionals"), and the statutorily-mandated separate unit of Guards), with a fourth unit called "Technical" being recognized in some cases. See, for example, *St. Francis Hospital "II"*, (1984) 271 NLRB 948, 116 LRRM 1465, and the more stringent "disparity of interest" test ("show us why they *can't* bargain together") adopted therein. The extent of continuing litigation to achieve greater or smaller units, however, together with the lack of clear support from the Courts for one approach or the other that the Board was taking in these matters, finally led the Board in 1987 to refer the matter to a process of "Rule"-making, wherein representations from the community at large were invited, prior to the Board itself deciding and announcing what its policy on "appropri-

ateness” henceforward was to be. See the *Federal Register* of Thursday, July 2, 1987, “Collective-Bargaining Units in the Health Care Industry; Notice of Proposed Rulemaking and Notice of Hearing”, recorded at 52 Fed. Reg. 25142. Out of that process came the NLRB’s “Final Rule”, found at (1989) 29 CFR s.103.30. Also see “Analysis”, (1989) 131 LRR 8. That Final Rule provided that, “except in extraordinary circumstances and in circumstances where there are existing non-conforming units”, the Board’s approach to appropriate bargaining units for all acute-care hospitals henceforth would be:

- (1) All registered nurses.
- (2) All physicians.
- (3) All professionals except for registered nurses and physicians.
- (4) All technical employees.
- (5) All skilled maintenance employees.
- (6) All business office clerical employees.
- (7) All guards.
- (8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

At the same time, the Board in its commentary with respect to the “Final Rule”, as set out in the *Federal Register* of April 21, 1989, 54 F.R. 16336, noted, at 16341:

Despite the foregoing, and despite the improbability that the problem will frequently arise, we agree that units of two or three employees, or of similarly small numbers of employees, would in many cases be impractically small, especially in the health care industry. Where so few employees are involved, it can be argued with some degree of persuasiveness that despite the shared, unique concerns and backgrounds that would otherwise make the separate units appropriate, these concerns are outweighed by concerns over disproportionate, unjustified costs and undue proliferation of units.

The Board initially proposed as well to limit its 8-unit rule to only the larger of the acute-care hospitals. In the end, however, the Board decided that such a distinction was not sustainable, and that the observations and judgments it had made should apply to *all* acute-care hospitals regardless of their size. The Board did, however, decide at the same time that nursing homes should be excluded entirely from the application of the Rule.

12. In the course of coming to those conclusions, a more detailed commentary with respect to the Board’s proposed rule and units was in fact set out in the *Federal Register* of September 1, 1988, 53 F.R. 33900, “Collective-Bargaining Units in the Health Care Industry; Second Notice of Proposed Rulemaking”. At page 33905 of that Second Notice, for example, the Board noted:

Under rulemaking as under adjudication, we intend at all times to be mindful of avoiding undue proliferation, not only because this desire was expressed in the legislative history, but also because it accords with our own view of what is appropriate in the health care industry. It would be most undesirable to create or permit a large-scale splintering of the workforce into the numerous trades, technical disciplines, and professionals typically found in health care institutions. To give each such grouping a separate voice for organizing and negotiating would create a never-ending round of bargaining sessions and individualized demands not conducive to stabil-



ity, industrial peace, or the smooth delivery of services to the public. We have entered the rule-making endeavor with an intention to create a reasonable number of units that will realistically reflect pronounced natural groupings to be found in health care facilities: groupings that will not be so large that organizing them is exceedingly difficult, and representing them even harder because of inherent conflicts of interest within the groups; but large enough that unnecessary, repetitious rounds of bargaining are avoided along with such undesirable results as frequent strikes, wage whipsawing, and jurisdictional disputes.

The general approach taken by the employer side of the industry was in the main that the number of units ought to be limited to two, “professional” and “non-professional” (apart from the statutory “guards” unit), along the lines that the Board itself had adopted in the more immediate past. The term “professionals”, it might be noted, is attempted to be defined in the *National Labor Relations Act* as follows:

SEC. 2. ...

(12)(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Registered Nurses had historically been considered to fall within such a “professional” unit, along with other classifications such as Dietitians and Pharmacists. The *National Labor Relations Act* prevents the combining of professionals with a unit of non-professionals unless the former so choose, and the Board in this “Second Notice of Proposed Rule-making”, in discussing its proposal to revert to a separate unit of Registered Nurses standing alone, observed at p. 33913:

There are two types of teams found in hospitals. The first is the nursing team which consists of RNs, LPNs, and aides. This type of team is found throughout the industry. However, as this team contains only nurses and non-professionals, and the Act provides that professionals are entitled to a separate unit if they choose, the nursing team is not relevant to the issue presented.

The Licensed Practical Nurse (“LPN”) as a result has typically been considered by the NLRB as falling within the generic “technical” unit (where, in fact, they could in situations like Nursing Homes be the only classification contained therein). Speaking again of the unit of Registered Nurses being proposed separately in the Notice, the Board also noted, at p. 33916:

16. *Proliferation of units.* As has been documented elsewhere, the evidence in the record does not support the assumption that the recognition of RN-only units will lead to a demand by other professional groups to organize as separate units. In fact, as previously indicated, the AHA acknowledges in its brief that in the overwhelming majority of facilities where RN units exist, other professionals have not been represented in separate units. [AHA Br. at 24.] SEIU health care organizing director Splain concluded that 10 years of statistics show relatively little organizing in residual hospital units. There are 16 hospitals in Ohio that have a separate RN unit, and only one unit in which professionals other than RNs are represented separately. [King, Chi II 38-39; Shepard 4927.] Health care workers organize no more frequently in facilities where some workers engage in collective bargaining than they do in facilities where no bargaining units have been represented [WS Splain at 14-17]. One witness testified that a typical hospital has an RN

unit, an LPN unit or technical unit, a service and maintenance unit, and sometimes an operating engineers unit [WS Patek at 4].

13. It might also be noted that the Board, on the issue of combining units in general, went on at p. 33932 of its “Second Notice of Proposed Rulemaking” to say:

XIX. Combined Units

The Notice of Proposed Rulemaking provided that, in addition to the specified units, “any combination will also be appropriate, at the union’s option and so long as the requirements of section 9(b)(1) and (3) are met.” The reason for the reference to the union’s option was that the union, as petitioner, need seek only an appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 417-18, enfd. on other grounds 190 F.2d 576 (7th Cir. 1951); *Parsons Investment Co.*, 152 NLRB 192, 193 at fn. 1 (1966). It does not benefit an employer to have the option of showing that another unit, perhaps a combined unit, is also appropriate, or even more appropriate, since the appropriateness of an alternative unit is not the issue. *Parsons Investment Company*, *supra*; *Federal Electric Corporation*, 157 NLRB 1130, 1131-32 (1966). We therefore reject arguments by some employers that it is unfair to give only unions the option of combining units. (See, e.g. AHA Br. 49; Comment 256, Durham, attorney for California Association of Health Facilities.) However, upon reflection, we believe that we defined too broadly a union’s option to seek, alternatively, combined units. In the NPR, as indicated, we implied that *any* combination of the enumerated units would also be appropriate; after giving this matter further thought, we believe that we have insufficient evidence at this time to say that *per se*, all combinations will be found appropriate. We believe this is a matter we will have to decide in the course of individual cases, by adjudication. While there are some combinations that, while not required under these rules, would obviously be appropriate, such as all professionals, or all non-professionals, there may be other, more unusual combinations that need to be examined for appropriateness. We meant to say only that combinations of the enumerated units are not thereby precluded, and we have therefore modified the rule to provide that combinations “may” be appropriate.

Nonetheless, the end result of this Rule-making activity was far from satisfactory from the point of view of the employer side of the industry, and was challenged by the American Hospital Association in the courts. Ultimately, however, the U.S. Supreme Court ruled that it lay within the specific rule-making powers granted to the Board by its governing legislation for the Board to make such a “Rule” for the exercise of its discretion, noting in particular the proviso attached by the Board itself with respect to the possibility of deviating from the prescribed list in “exceptional circumstances”. See *American Hospital Assn. v. NLRB*, (1991) 137 LRRM 2001; 111 S. Ct. 1539.

14. In the *Mississauga Hospital* case that is the focus of the argument here, the Board in its decision notes that there had been filed with it a number of collective agreements wherein the bargaining unit was described as including only RNA’s. The employer was a full-service community hospital employing approximately 2300 employees, of whom some 165 were Registered Nursing Assistants whom the present PNFO sought to represent. Some months previously, the United Steelworkers of America had brought an application for certification for the “traditional” service unit, including the RNA’s. This particular group of RNA’s, however, were not prepared to be represented in collective bargaining in a unit that joined them with other “service” employees, and their opposition as a group appears to have been instrumental in defeating the Steelworkers’ efforts to represent *anyone* in a service-staff bargaining unit for this hospital. Shortly thereafter, the PNFO brought an application of its own, seeking to represent solely the hospital’s RNA’s. At the time of that application there were two categories within the hospital already represented in collective bargaining: a unit of 6 stationary engineers, and a full-time/part-time unit of laboratory employees comprised of 60 employees in all. Three years previously the hospital had recognized as well an in-house organization to represent RNA’s in employment matters with the hospital, as it had, apparently, with respect to RN’s and a Unit Administrator (“managerial”) group. With respect to the RNA group itself, the organization had formulated and presented wage and benefit

proposals for RNA's at the hospital, had intervened on behalf of an RNA who had lost her job, and had had input into the development of the current RNA job description. The hospital was also in the process of setting up a "service group" staff communication committee, which excluded anyone reporting through the nursing division, including the RNA's. Against that background the Board was being asked by the hospital to find, in the language of the jurisprudence, that having to deal with the RNA's as a separate group in collective bargaining would cause "serious labour relations problems" for the employer, and an "undue proliferation" of bargaining units within the hospital. The Board declined to so find.

15. In arriving at its conclusion, the Board in *Mississauga Hospital* touched on many of the same themes one sees articulated in the comprehensive "Rule-making" process of the NLRB referred to above. The Board noted that much of the initial placement of RNA's in a service-staff bargaining unit was traceable to a combination of the stage of training and responsibilities of the RNA's at that time, together with the practice of the Board, already developed, of granting bargaining units composed solely of Registered Nurses. At paragraph 41 of the case, for example, the Board summarized some of the observations made along these lines in earlier cases, and commented:

41. At an early point in history the Board recognized a separate bargaining unit for registered and graduated nurses. RNA's (or certified nursing assistants) were employed to perform at a substantially lower skill level compared to nurses and compared to the level of skill expected of RNA's today. Although "service" employees were organizing, little if any organizing of paramedical employees was occurring. Subsequently those paramedical employees have sought to participate in collective bargaining and appropriate bargaining unit configurations for those various employees have been determined (see particularly *Stratford General Hospital*, *supra*). The fact that RNA's have historically been included in the service unit appears to be at least partly as a result of the Board having recognized nurses in a separate bargaining unit (see the quote from *Essex Health Association* at paragraph 37 herein).

• • •

44. The Board has long recognized that RNA's share a community of interest with other employees in a "service" or "all-employee" bargaining unit. It has also recognized that RNA's may well share a community of interest with RN's or paramedical employees, but that by virtue of trade union organizing and collective bargaining history, the RNA's have found themselves included in the service unit...

We would note as well that the consideration of section 3 of the Act, and the ability of employees to combine themselves into groupings that will make collective bargaining more accessible, did not begin with the *Mississauga Hospital* case - nor with the current government's tabling in November of a "Discussion Paper" on what may or may not find its way into actual amendments to the *Labour Relations Act*. Indeed, as the *Mississauga Hospital* case itself pointed out, access to the rights set out in section 3 has long been an important consideration of the Board in addressing itself to the question of an appropriate bargaining unit, as noted for example, in the passage cited from the 1970 *Board of Education for the City of Toronto* case, at page 21 of *Mississauga Hospital*:

19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of the Labour Relations Act. The National Labour Relations Board in the United States has recognized in certain cases that its determination of appropriate bargaining units has "operated to impede the exercise by employees... of their rights of self-organization...". *Save-on-Drugs Inc.* 138 NLRB 1032 (1961); see also *Quaker City Life Ins. Co.*, 134 NLRB 960 (1961)....

This theme, as the *Mississauga* decision itself also notes, of course has been carried through by this Board in such frequently-cited cases as *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7; *Canada*



*Trustco*, [1977] OLRB Rep. June 330; and *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. And in particular, see more recently *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266.

16. At the same time, the Board in articulating such concerns has reflected its awareness of the need to balance that principle of self-organization with a concern for rational and viable bargaining structures. As the *Ponderosa Steak House* case, for example, put it:

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but “the unit of employees that is appropriate for collective bargaining”. In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization.

This was the very tension analyzed at length by the Board in the *Stratford General Hospital* case, [1976] OLRB Rep. Sept. 459, referred to by the respondent, wherein the Board ultimately came to the conclusion (and this was the only issue in the case) that the appropriate bargaining unit there should be described in terms of “all paramedical personnel”, as opposed to a less comprehensive bargaining unit effectively seeking to separate “professional” from “technical” employees within the paramedical group, as proposed by the intervener Association of Allied Health Professionals (“AAHP”). In doing so the Board rejected the argument of the AAHP that it was practicable and appropriate to attempt to draw lines around bargaining units on the basis of the upgrading of educational qualifications, or how far along a particular occupational group had moved in what was termed the “process of professionalization” - including the development of specialized, self-regulating organizational bodies. It should be noted that the Board in *Mississauga Hospital* was no more persuaded by the evolving “professionalism” argument, standing alone, than it had been in the *Stratford General* case:

43. Over time RNA's have undergone a “process of professionalization” not unlike nurses and those employed in paramedical classifications (see the discussion in *Stratford General Hospital*, *supra* at paras. 14 and 15 and the comments in *Hospital for Sick Children*, *supra* at paras. 19, 36 and 37). No doubt this process has also affected the RNA's approach to collective bargaining. However we agree with the discussion in *Stratford General Hospital* and *Hospital for Sick Children* that claims of professional status do not warrant the fashioning of separate bargaining units.

Indeed, the Board went to considerable length in *Mississauga Hospital* to make it clear in its decision that its conclusion with respect to appropriateness in that case was very much a product of the facts and historical background with which it was confronted, and that any “final” determination about the bargaining units within which a group like the RNA's in the long run might come to be placed, was not something that the Board was purporting to make:

47. The bargaining unit sought by the applicant here clearly includes a group of employees with a sufficiently coherent community of interest that they can bargain together and do so on a viable basis. The applicant seeks to represent a group of employees totalling approximately 165 all of whom have similar skills and perform similar functions and enjoy similar terms and conditions of employment. This is a largely unorganized hospital wherein the employer already recognizes and has a history of dealing separately with this same group of employees in a less formalized manner but for purposes very similar to those in collective bargaining. While we might prefer that the RNA's, if opposed to being included in a service unit, be included in a bargaining unit with either RN's or paramedical employees, on balance, we are not persuaded, notwithstanding the Board's earlier decisions, that there is potential for serious labour relations problems in *this* institution, provided the bargaining unit is described as including those persons employed as registered or graduate nursing assistants... This conclusion may well be different in

an institution where there exists a large complement of employees in classifications whose functions overlap. However that is not the evidence before us.

48. In coming to this conclusion we do not intend that anything more be taken from it than is necessary for the resolution of the dispute between these parties. A bargaining unit comprised of one classification of employee is not one that would normally be found to be appropriate. RNA's do not enjoy status as a craft. Both these factors are relevant to the current configuration of bargaining units in the health care sector. The multiplicity of classifications contained in a paramedical bargaining unit do not evidence this same historical anomaly faced by the RNA's. Therefore, it is doubtful that any sensible basis would exist for fragmenting that "usual" bargaining unit any further, particularly in light of the Board's comments in *Stratford General Hospital*, *supra*, (and see *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672). While the decision in *Hospital for Sick Children*, *supra*, places considerable weight on the bargaining unit configuration sought by an applicant it does not ignore concerns of undue fragmentation. In that RNA's do not have status as a craft there would seem to be no basis from which they could "carve out" their classification from existing bargaining unit configurations (Section 6(3) also creates a discretion in the Board where employees are already represented by another trade union to determine whether a "carve-out" would be appropriate in the circumstances of any particular case. See for example, *Shelbourne Residence*; *Re O.N.A.* [1991] OLRB Rep. Aug. 1005.) To the extent that this decision speaks to bargaining unit configurations in a hospital setting and more particularly those involving RNA's it recognizes that a bargaining unit comprised solely of RNA's may be an appropriate bargaining unit while at the same time recognizing that a bargaining unit described as the "standard" service or all-employee unit including RNA's may well also be appropriate. The Board has already acknowledged that RNA's may also share a community of interest with either the RN's or the employees in the "paramedical" unit. In this case the applicant seeks to represent RNA's and while recognizing a continuing concern regarding undue fragmentation and its potential effects on both effective collective bargaining and legitimate employer concerns we are not persuaded that in this case they outweigh the equally compelling expression of these employees' section 3 rights.

Clearly, therefore, what the Board was doing in *Mississauga Hospital* was to indicate a willingness to consider new "options" for the placement of RNA's that went beyond the traditional, and only, option that had been made available to that group in the past. That is the issue of "appropriateness", and the *Mississauga Hospital* case determines that there can be cases where, based on the facts, and the positions litigated by the parties before the Board, a bargaining unit comprised solely of RNA's might be found to be the "appropriate" one. But just as clearly, in the paragraphs quoted above, the Board did not purport to limit the field henceforward to one single option, or one single trade union. In the Province of Alberta, for example, that Board has for some years recognized a unit of "Direct Nursing Care" staff, which is really their "RN" unit, including registered and graduate nurses, psychiatric nurses, and nursing instructors, and then an "Auxiliary Nursing Care" unit comprised of all of the persons employed in such positions as registered nursing assistants, nursing aides, nursing orderlies, and nursing assistants. See the Alberta Labour Relations Board's most recent Information Bulletin #10, "Standard Bargaining Units", dated 03-04-91. Where all of this will lead in the future remains to be determined by the Board, on the basis of how trade unions and employees in this sector seek to organize, and the compelling nature of the propositions advanced before it.

17. Such a case-by-case approach, while unhappily litigious (initially), would appear, in a situation like the present, to be an appropriate way for the Board to proceed. Indeed, it is interesting to note the comments being made at almost exactly the same time by the National Labor Relations Board in one of the first health-care cases to come before it subsequent to the proclamation of its "Rule". In the end that Rule, as noted, was decided not to have application to nursing homes, and in *Park Manor Care Centre*, (1991) 305 NLRB No. 135 (decision dated December 18, 1991), the Regional Director had accepted a petitioning Union's request for a service and maintenance employees unit which excluded the category of "technicals" - in that case comprised solely of 4 LPN's. In doing so the Regional Director had relied on some earlier cases of the Board finding



that LPN's were "technical" employees who, "because of their distinct functions, training, skills and education, do not share a sufficient community of interest with other non-technical employees to warrant their inclusion in the same bargaining unit". See *Madeira Nursing Center*, (1973) 203 NLRB 323; and also *Pine Manor Nursing Home*, (1978) 238 NLRB 1654, where the Board gave the LPN's the option of reverting to a service and maintenance unit, or constituting a separate unit of "technical". On appeal however, the Board remitted the case back to the Regional Director to be dealt with in accordance with both the general principles and some of the evidence identified in the course of the Board's Rule-making process. In stating that that was how the Board itself intended to be guided for the future in addressing the question of appropriateness in situations not directly covered by the Rule, the Board commented:

We hope, however, that after various units have been litigated in a number of individual facilities, and "after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate".

18. With respect to the present case, we agree with the applicant that the facts and circumstances at this hospital and the Mississauga Hospital bear far more similarities than they do differences, and the Board does not find the arguments made by the respondent for the traditional "service" unit any more compelling here than it did in the *Mississauga* case. It is conceded, in fact, by the respondent in the present case that the community-of-interest characteristics of the RNA group take them much closer to the Nursing Department than to the general Service group - and that is the way that the respondent has historically treated them. The only exception to that has been with respect to levels of salary and benefits, in which area the employer here, like hospitals generally, has tracked the rates and benefit levels applying specifically to RNA's under the terms of the prevailing Service-Staff collective agreements. But that is a matter, once again, that simply arises out of the fact that the Board, when first dealing with this category of employees, found that that service unit was the appropriate one in which the RNA's were to be placed, and it is no more persuasive here, standing against the other circumstances before the Board, than it was in the *Mississauga Hospital* case. Rather, as in the *Mississauga Hospital* case, we find the bargaining unit proposed by the applicant, comprised solely of those employees employed at this hospital as Registered and Graduate Nursing Assistants, to be the appropriate one for the purpose of section 6(1) of the *Labour Relations Act*. And as in *Mississauga Hospital*, we say that notwithstanding the fact that a bargaining unit of service or support staff which included the RNA's at this hospital could clearly also be "appropriate". What the Board might find with respect to the inclusion of the Registered Nursing Assistants with other groupings of employees within the hospital is, as the applicant points out, not before us here.

19. The Board accordingly finds that all employees of the respondent in the Town of Bracebridge employed as registered or graduate nursing assistants, save and except nurse manager and persons above the rank of nurse manager, is a unit appropriate for collective bargaining.

20. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 10, 1992, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. A certificate will issue to the applicant.

**DECISION OF BOARD MEMBER D. A. MACDONALD; April 22, 1992**



1. I dissent from the majority decision and in doing so adopt the comments made by my colleague W. A. Correll in his dissent in the *Mississauga Hospital* case released December 5, 1991.

2. The Board precedent, relative to the issues in this case are lengthy. The Board has consistently decided that Registered Nursing Assistants should be included in a service unit. Please refer to the following cases regarding this issue:

*Riverside Hospital of Ottawa*, [1971] OLRB Rep. Jan. 10;

*Altamount Nursing Home Limited*, [1971] OLRB Rep. July 361;

*McKellar General Hospital*, [1971] OLRB Rep. June 312;

*Smith Falls Public Hospital*, [1973] OLRB Rep. July 394;

*Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266.

3. The bargaining unit structures in the Health Care sector, which evolved from the above referenced cases, have led to stable bargaining relationships for over twenty years.

4. In my view the decision of the majority would lead to fragmented bargaining units, which would not be conducive to harmonious Labour Relations. "Appropriateness" does not depend upon whom the union has organized, nor would an employee grouping otherwise appropriate cease to be appropriate because the unions did not enjoy majority support in that unit or some sub-division of it.

5. I would have dismissed this application for all of the above reasons.









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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1992

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**0909-91-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Guillot Builders Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, International Brotherhood of Painters and Allied Trades; Retail, Wholesale and Department Store Union (Intervenors) v. Group of Employees (Objectors)

Unit: "all carpenters and carpenters' apprentices in the employ of Guillot Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Guillot Builders Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**0911-91-R:** International Brotherhood of Painters and Allied Trades (Applicant) v. Guillot Builders Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Labourers' International Union of North America, Ontario Provincial District Council, Retail, Wholesale and Department Store Union (Intervenors) v. Group of Employees (Objectors)

Unit: "all painters and painters' apprentices in the employ of Guillot Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Guillot Builders Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**0918-91-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Guillot Builders Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, International Brotherhood of Painters and Allied Trades. Labourers International Union of North America (Ontario Provincial District Council), Retail, Wholesale and Department Store Union (Intervenors) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Guillot Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Guillot Builders Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**1333-91-R:** The Sault Ste. Marie Typographical Union Local 746 of the Communication Workers of America (Applicant) v. The Sault Star, a Division of Southam Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of The Sault Star, a division of Southam Inc. employed in the advertising department in Sault Ste. Marie, save and except the advertising manager, retail advertising manager, classified advertising manager, persons above the rank of advertising manager, retail advertising manager and classified advertising manager, persons regularly employed for not more than 24 hours per week, students employed during the

school vacation period and employees for whom any trade union held bargaining rights as of July 16, 1991” (22 employees in unit)

**1638-91-R:** Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. McEndon Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers, persons engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing and maintaining of same and truck drivers employed by McEndon Limited in all sectors of the construction industry excluding the industrial, commercial and institutional sector within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman” (41 employees in unit)

**2139-91-R:** Peterborough Typographical Union Local 248 (Applicant) v. Thomson Newspapers Company Limited (Respondent)

Unit #1: “all employees of the respondent in its Peterborough Examiner Division regularly employed for not more than 24 hours per week and students employed during the school vacation period in the advertising business and circulation department, save and except telephone solicitor supervisor and persons above the rank of supervisor and students employed on a co-operative training program with a school, college or university” (18 employees in unit)

Unit #2: (see Applications for Certification Dismissed without vote)

Unit #3: “all employees of Thomson Newspapers Company Limited in its Peterborough Examiner Division regularly employed for not more than 24 hours per week and students employed during the school vacation period in the mail room, save and except mail room supervisor and persons above the rank of supervisor” (5 employees in unit)

**2658-91-R:** Hotels, Clubs, Restaurants, Taverns Employees Union, Local 261 (Applicant) v. Cara Operations Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Cara Operations Limited at its Airline Services Division in Gloucester, save and except Assistant Manager, persons above the rank of Assistant Manager, Flight Kitchen Supervisors, Trucking Supervisor, Customer Service Supervisor, office staff and Chefs” (91 employees in unit)

**3012-91-R:** Teamsters Local Union 938 (Applicant) v. Macdonald Mirror Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the Macdonald Mirror Inc. in the Regional Municipality of Peel, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period” (52 employees in unit) (*Having regard to the agreement of the parties*)

**3092-91-R:** Ontario Public Service Employees Union (Applicant) v. The Raoul Wallenberg Centres Inc. (Respondent)

Unit: “all employees of The Raoul Wallenberg Centres Inc. in the City of London, save and except supervisors and persons above the rank of supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

**3306-91-R:** The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Cara Operations Limited at its Swiss Chalet Take-Out and Restaurant at 234 Bloor Street West in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (56 employees in unit) (*Having regard to the agreement of the parties*)

**3316-91-R:** The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: “all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students by Cara Operations Limited at its Swiss Chalet Take-out and Restaurant at 181 Eglinton Avenue East in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Manager and persons above the rank of Assistant Dining Room Manager” (49 employees in unit) (*Having regard to the agreement of the parties*)

**3579-91-R:** Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. Rexdale Mobile Truck Wash (1981) Inc. (Respondent)

Unit: “all employees of Rexdale Mobile Truck Wash (1981) Inc. in the Municipality of Metropolitan Toronto and the City of Oshawa, save and except forepersons, persons above the rank of foreperson, office and sales staff” (21 employees in unit) (*Having regard to the agreement of the parties*)

**3584-91-R:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Sunland Painting Company Limited A Division of Ontario 954795 Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Sunland Painting Company Limited A Division of Ontario 954795 Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Sunland Painting Company Limited A Division of Ontario 954795 Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**3654-91-R:** Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. 511825 Ontario Inc., c.o.b. as Connor Group Homes (Respondent)

Unit: “all employees of 511825 Ontario Inc., c.o.b. as Connor Group Homes in the Township of Rama, save and except supervisors, persons above the rank of supervisor, office, clerical staff and students employed during the school vacation period, and students employed for training purposes from colleges and universities” (11 employees in unit) (*Having regard to the agreement of the parties*)

**3730-91-R:** Canadian Security Union (Applicant) v. Maple Leaf Gardens Limited (Respondent)

Unit: “all security guards in the employ of Maple Leaf Gardens Limited in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor and persons regularly employed for not more than 24 hours per week” (8 employees in unit) (*Having regard to the agreement of the parties*)

**3741-91-R:** Ontario Nurses’ Association (Applicant) v. Miramichi Lodge (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit #1: “all registered and graduate nurses employed by Miramichi Lodge, in the city of Pembroke, save and except the Resident Care Coordinators, persons above the rank of Resident Care Coordinator and persons regularly employed for not more than 24 hours per week” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all registered and graduate nurses employed by Miramichi Lodge in the city of Pembroke, regularly employed for not more than 24 hours per week, save and except Resident Care Coordinators and persons above the rank of Resident Care Coordinator” (10 employees in unit) (*Having regard to the agreement of the parties*)

**3744-91-R:** International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. DeSousa Painting Ltd. (Respondent)



Unit: “all painters and painters’ apprentices in the employ of DeSousa Painting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of DeSousa Painting Ltd. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

**3780-91-R:** Labourers’ International Union Of North America, Local 183 (Applicant) v. North Seven Construction Limited (Respondent)

Unit: “all bricklayers, bricklayers’ apprentices, and construction labourers in the employ of North Seven Construction Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit)

**3801-91-R:** Office and Professional Employees International Union (Applicant) v. Hamilton Aids Network for Dialogue and Support (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the Hamilton Aids Network for Dialogue and Support in the Regional Municipality of Hamilton Wentworth, save and except Executive Director and persons above the rank of Executive Director” (6 employees in unit) (*Having regard to the agreement of the parties*)

**3818-91-R:** Ontario Public Service Employees Union (Applicant) v. Harc Incorporated (Respondent)

Unit: “all employees of Harc Incorporated in the Town of Hanover and the Village of Neustadt, save and except Supervisors, persons above the rank of Supervisor, Accounting Clerk, Administrative Secretary, persons employed on a government contract basis and students employed during the school vacation period” (11 employees in unit) (*Having regard to the agreement of the parties*)

**3847-91-R:** International Union United Plant Guard Workers of America Local 1962 (Applicant) v. Kitchener-Waterloo Hospital (Respondent)

Unit: “all security guards employed by the Kitchener-Waterloo Hospital in the City of Kitchener, save and except Supervisors and persons above the rank of Supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

**3860-91-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation #151 (Respondent)

Unit: “all employees of York Condominium Corporation #151 engaged in cleaning and maintenance in the Municipality of Metropolitan Toronto, including Resident Superintendent, save and except Property Manager, persons above the rank of Property Manager, office and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3862-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. 946825 Ontario Ltd. D.B.A. Malfar Plumbing and Heating (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of 946825 Ontario Ltd. D.B.A. Malfar Plumbing and Heating in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of 946825 Ontario Ltd. D.B.A. Malfar Plumbing and Heating in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

**3869-91-R:** Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses - Ottawa-Carleton Branch (Respondent)

Unit: “all registered and graduate nursing assistants employed in a nursing capacity by the Victorian Order of Nurses - Ottawa-Carleton Branch in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (38 employees in unit) (*Having regard to the agreement of the parties*)

**3908-91-R:** Canadian Union of Public Employees (Applicant) v. Dundas Library Board (Respondent)

Unit: “all employees of the Dundas Library Board in the Town of Dundas, save and except Department Heads, persons above the rank of Department Head, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

**3946-91-R:** London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Babcock Nursing and Rest Homes Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Babcock Nursing Home in the Village of Wardsville, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, and office and clerical staff” (51 employees in unit) (*Having regard to the agreement of the parties*)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**3024-91-R:** The Ontario Secondary School Teachers’ Federation (Applicant) v. The Ottawa Board of Education (Respondent) v. Ontario Public School Teachers’ Federation (Intervener)

Unit: “all teacher aides employed by The Ottawa Board of Education in the City of Ottawa, save and except persons expected to be employed for a term of less than thirty (30) continuous working days, students employed in a co-operative work program, and employees in bargaining units for whom any trade union held bargaining rights as of December 13, 1991” (325 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	347
Number of persons who cast ballots	275
Number of ballots marked in favour of applicant	70
Number of ballots marked in favour of intervener	105
Number of ballots marked in favour of no union	96
Number of ballots segregated and not counted	4
Number of persons listed as eligible	343
Number of persons who cast ballots	240
Number of ballots marked in favour of applicant	126
Number of ballots marked in favour of no union	114

**3189-91-R:** Canadian Union of Public Employees (Applicant) v. The City of Gloucester Library Board (Respondent)

Unit: “all employees of City of Gloucester Public Library Board in the City of Gloucester regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Director, administrative secretary, finance officer, recording secretary to the Board, head of technical services, head of cataloguing, branch heads, and persons above the rank of branch head” (57 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	56
Number of persons who cast ballots	27

Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	2

**3198-91-R:** Canadian Union of Public Employees (Applicant) v. La Corporation du Centre d'accueil Roger-Séguin (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of La Corporation du Centre d'accueil Roger-Séguin in Clarence Creek, save and except professional medical staff, registered graduate and undergraduate nurses, office and clerical employees, supervisors and persons above the rank of supervisor" (71 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	77
Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	24

**3485-91-R:** Canadian Union of Public Employees (Applicant) v. Mohawk Hospital Services Inc. (Respondent)

Unit: "all employees of Mohawk Hospital Services Inc. in its Linen Supply and Services Division at Chednac Drive, Hamilton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, administrative staff, laboratory staff and the employees in the bargaining units for which any trade union held bargaining rights on January 29, 1992" (49 employees in unit)

Number of persons listed as eligible	73
Number of persons who cast ballots	57
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	11

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**1820-90-R:** Graphic Communications International Union Local N-1 (Applicant) v. Moore Corporation Limited (Respondent) v. Kelly O'Donnell, Kelly O'Donnell, Barbara Carroll, G. M. Greenfield, Elaine Jewell, Mark Hyland (Objectors)

Unit: "all employees of Moore Corporation Limited at its Moore Data Management Services Division in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period and persons employed in a co-operative training program with a University or Community College" (98 employees in unit)

Number of persons listed as eligible	125
Number of persons who cast ballots	122
Number of ballots excluding segregated ballots, cast by persons whose names appear on voter's list	118
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	57
Number of ballots segregated and not counted	4

**2708-90-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Polytech Coatings Limited (Respondent) v. Samuel Owusu Et Al (Objectors)

Unit: "all employees of Polytech Coatings Limited in the City of Mississauga, save and except supervisors,



persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (93 employees in unit)

Number of persons listed as eligible	101
Number of persons who cast ballots	98
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	43

### Applications for Certification Dismissed Without Vote

**0626-90-R:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Theatrecorp Ltd., WGC Facility Management Corporation (Respondents) (16 employees in unit)

**1940-91-R:** Ontario Liquor Boards Employees’ Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (20 employees in unit)

**2139-91-R:** Peterborough Typographical Union Local 248 (Applicant) v. Thomson Newspapers Company Limited (Respondent) (Unit #1: see Bargaining Agents Certified without vote, unit #2: dismissed, unit #3: see Bargaining Agents Certified without a vote) (18 employees in unit)

**3425-91-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Rosen Dairy Products Ltd. (Respondent) v. Group of Employees (Objectors) (30 employees in unit)

**3446-91-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. S & R Car Rentals Toronto (Central) Ltd. (Respondent) (55 employees in unit)

**3779-91-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Hudson’s Bay Company (Respondent) (50 employees in unit)

**3924-91-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Toronto Structural Group Inc. (Respondent) v. Operative Plasterers’ and Cement Masons International Association of the United States and Canada, Local 598 (Intervener) (2 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**3019-91-R:** Ontario Public School Teachers’ Federation (Applicant) v. The Ottawa Board of Education (Respondent) v. The Ontario Secondary School Teachers’ Federation (Intervener)

Unit: “All teacher aides employed by the Ottawa Board of Education in the City of Ottawa, save and except persons expected to be employed for a term of less than thirty (30) continuous working days, students employed in a co-operative work program, and employees in bargaining units for whom any trade union held bargaining rights as of December 13, 1991” (343 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	347
Number of persons who cast ballots	275
Number of ballots marked in favour of applicant	70
Number of ballots marked in favour of no union	96
Number of ballots marked in favour of second intervener	105
Number of ballots segregated and not counted	4
Number of persons listed as eligible	343
Number of persons who cast ballots	240
Number of ballots marked in favour of applicant	126
Number of ballots marked in favour of intervener	114

**3466-91-R:** Ontario Public Service Employees Union (Applicant) v. Chesley and District Memorial Hospital (Respondent)

Unit #1: “all employees of the Chesley and District Memorial Hospital in the County of Bruce, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period;” (20 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the Chesley and District Memorial Hospital in the County of Bruce, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees and office and clerical staff.” (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of persons listed as eligible	18
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	13

**Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**0557-91-R:** Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Amorim Enterprises Ltd. (Respondent)

Unit: “All employees of the respondent employed at its Harvey’s Restaurant located at 3095 Dougall Road, in the City of Windsor, save and except assistant managers and those above the rank of assistant manager” (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	21
Number of persons who cast ballots	16
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	1

**Applications for Certification Withdrawn**

**2207-88-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Applicant) v. Hanson Development Group (Respondent) v. Labourers International Union of North America, Local 183 (Intervener)

**1078-91-R; 1175-91-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Guillot Builders Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, International Brotherhood of Painters and Allied Trades, Labourers’ International Union of North America, Ontario Provincial District Council (Intervenors)

**2087-91-R:** Office and Professional Employee’s International Union (Applicant) v. Purolator Courier Ltd. (Respondent)

**2962-91-R:** Canadian Union of Public Employees (Applicant) v. Stoney Creek Lifecare Centre (Respondent)

**3031-91-R; 3190-91-R:** United Brotherhood of Carpenters' and Joiners of America, Local Union 1425 (Applicant) v. Midan Mechanical Contractors Inc. (Respondent)

**3254-91-R:** Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. Wieland Electric Incorporated (Respondent)

**3593-91-R:** Energy and Chemical Workers Union, (Applicant) v. Mead Johnson Canada Inc. (Respondent) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener) v. Group of Employees (Objectors)

**3745-91-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Mead Johnson Canada (Division of Bristol Myers Squibb Canada) (Respondent)

**3788-91-R:** Canadian Union of Restaurant and Related Employees (Applicant) v. Swiss Chalet Restaurant Dinnerex (Respondent)

**3789-91-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. 484446 Ontario Inc., c.o.b. as Westcliffe Home Hardware (Respondent) v. Group of Employees (Objectors)

**3804-91-R:** Canadian Union of Public Employees (Applicant) v. Versa Services Limited (at Riverside Hospital-Ottawa) (Respondent) v. Independent Canadian Transit Union (Intervener)

**3827-91-R:** Local 2228 International Brotherhood of Electrical Workers (Applicant) v. Corporation of the Town of Rockland (Respondent)

**3867-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. York Spring & Radiator Service Ltd. (Respondent)

**4073-91-R:** Labourers International Union Of North America, Local 506 (Applicant) v. Diplock Floor Ltd. (Respondent)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**1567-91-FC:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Romatt Custom Woodwork Inc. (Respondent) (*Granted*)

**3596-91-FA:** United Steelworkers of America (Applicant) v. International Discus Corporation (Respondent) (*Granted*)

**3615-91-FC:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Runnymede Development Corporation Limited (Respondent) (*Withdrawn*)

**3689-91-FC:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bradsil Limited, Bradsil Leasehold Limited, Bradsil (1980) Limited, Bradsil (1967) Limited (Respondents) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1678-90-R:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Theatrecorp Ltd., WGC Facility Management Corporation and Theatremark Ltd. (Respondents) (*Granted*)

**0359-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Norsan Construction Limited and/or, Eagle Contracting and Landscaping, Consulting & Designing and/or, 615949 Ontario Limited c.o.b. as Eagle Contracting Limited and/or, Eagle Contracting and Landscaping, Consulting & Designing\* and/or, Caledon Royal Construction Limited (Respondents) (*Granted*)



**0697-91-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Centrac Industries Limited and Centrac Inc. (Respondent) (*Dismissed*)

**1671-91-R:** Ontario Nurses' Association (Applicant) v. Toronto Hospital Corporation, Toronto General Hospital, St. Michael's Hospital, Sunnybrook Medical Centre, Wellesley Hospital, Toronto Western Hospital, The Sheppard Centre Self Care Dialysis Unit (Respondents) (*Withdrawn*)

**2932-91-R:** The Ontario Public Service Employees Union (Applicant) v. Cybermedix Health Services Limited and Canadian Medical Laboratories Limited (Respondents) (*Withdrawn*)

**3107-91-R:** International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Eldan Electric Company Limited and, Sergio Kamet and/or Elvis Kamet c.o.b. as Airport Electric (Respondents) (*Granted*)

**3436-91-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Coldmatic-Refrigeration of Canada Ltd. and , General Refrigeration Inc. (Respondents) (*Granted*)

**3549-91-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Black and McDonald Limited, Leslie Bros. Inc., Lake House Holdings Inc., Black and McDonald Mechanical Limited , Black and McDonald Group Limited (Respondents) (*Withdrawn*)

## SALE OF A BUSINESS

**0140-91-R:** The Municipality of Metropolitan Toronto (Applicant) v. Ontario Nurse's Association, Service Employees International Union, Local 204 (Respondents) v. Canadian Union of Public Employees, Local 79 (Intervener) (*Granted*)

**0359-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Norsan Construction Limited and/or, Eagle Contracting and Landscaping, Consulting & Designing and/or, 615949 Ontario Limited c.o.b. as Eagle Contracting Limited and/or, Eagle Contracting and Landscaping, Consulting & Designing\* and/or, Caledon Royal Construction Limited (Respondents) (*Granted*)

**1672-91-R:** Ontario Nurses' Association (Applicant) v. Toronto Hospital Corporation, Toronto General Hospital, St. Michael's Hospital, Sunnybrook Medical Centre, Wellesley Hospital, Toronto Western Hospital, The Sheppard Centre Self Care Dialysis Unit (Respondents) (*Withdrawn*)

**2045-91-R:** The Office and Professional Employees' International Union, Local 321 (Applicant) v. The Packaging Division of Domtar Inc. (Respondent) v. The Office and Professional Employees International Union, Local 267 (Intervener) (*Terminated*)

**2717-91-R:** Glass, Molders, Pottery, Plastics and Allied Workers International Union, and Local 29 (Applicant) v. Western Foundry Company Limited (Brantford Division) (Respondents) v. Canadian Brotherhood of Railway, Transport and General Workers (Intervener) (*Dismissed*)

**3107-91-R:** International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Eldan Electric Company Limited and Sergio Kamet and/or Elvis Kamet c.o.b. as Airport Electric (Respondents) (*Granted*)

**3288-91-R:** The Office and Professional Employees International Union, Local 267 (Applicant) v. The Packaging Division of Domtar Inc. (Respondent) v. Office and Professional Employees International Union, Local 321 (Intervener) (*Terminated*)

**3435-91-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Coldmatic-Refrigeration of Canada Ltd. and General Refrigeration Inc. (Respondents) (*Granted*)

**3549-91-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Help-

ers, Local 128 (Applicant) v. Black and McDonald Limited, Leslie Bros. Inc., Lake House Holdings Inc., Black and McDonald Mechanical Limited, Black and McDonald Group Limited (Respondents) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2391-90-R:** Bob Kennedy (Applicant) v. The International Union of Operating Engineers, Local 793 (Respondent) (*Terminated*)

**2544-90-R:** Mrs. Violet Martin (Applicant) v. Cement, Lime, Gypsum and Allied Workers Division of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 576 (Respondent) v. Hamilton Automatic Vending Company Limited (Intervener) (*Dismissed*)

**3033-91-R:** Ron Martin (Applicant) v. United Steelworkers of America (Respondent) v. Drillex International of Canada Inc. (Intervener)

Unit: "all employees of Drillex International of Canada Inc. in the Regional Municipality of Sudbury, save and except Assistant Foremen, persons above the rank of Assistant Foreman, and office, clerical, technical and sales staff" (34 employees in unit) (*Granted*)

Number of persons listed as eligible	33
Number of persons who cast ballots	33
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	24

**3291-91-R:** Idoardo Martins (Applicant) v. Bakery Confectionary and Tobacco Workers Union, Local #264 (Respondent) v. Aloro Foods Inc. (Intervener)

Unit: "all employees of Aloro Foods Inc. in the City of Mississauga, Ontario, save and except Plant Manager, persons above the rank of Plant Manager, office and sales staff, Technical Services Manager, persons employed for not more than 24 hours per week and students employed during the school vacation period" (27 employees in unit) (*Withdrawn*)

**3349-91-R:** Gwen Federer (Applicant) v. Canadian Union of Restaurant and Related Employees, Hotel Employees, and Restaurant Employees Union, Local 88, AFL-CIO-CLC ("UNION") (Respondent) v. Tony Barradas Foods Limited c.o.b. Swiss Chalet Restaurant (Intervener) (*Terminated*)

**3397-91-R:** Barbara Rainey (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. H. W. Gluck Limited c.o.b. as Keswick I.G.A. (Intervener)

Unit: "all employees of H.W. Gluck Limited c.o.b. as Keswick I.G.A. in Keswick, save and except Meat Department employees, Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (6 employees in unit) (*Granted*)

Number of persons listed as eligible	12
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	8

**3398-91-R:** Duane Shaw (Applicant) v. United Food & Commercial Workers International Union Local 633 (Respondent) v. H. W. Gluck Limited c.o.b. as Keswick I.G.A. (Intervener)

Unit: "all Meat Department employees of H.W. Gluck Limited c.o.b. as Keswick I.G.A. in Keswick, save and except Meat Manager, Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Granted*)

Number of persons listed as eligible	7
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

**3427-91-R:** Robert Crossan (Applicant) v. United Food and Commercial Workers Local Union 175 (Respondent) v. Trophy Foods Inc. (Intervener)

Unit: "all employees of Trophy Foods Inc. at its plant in Bramalea, Ontario, save and except Assistant Plant Managers, persons above the rank of Assistant Plant Manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Granted*)

Number of persons listed as eligible	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	12

**3437-91-R:** Sandra M. Finch (Applicant) v. United Electrical, Radio and Machine Workers of Canada (UE) and its Local 520 (Respondent) v. Gencab of Canada Ltd. (Intervener) (*Granted*)

**3463-91-R:** Ms. Mirvana Kimball (Applicant) v. Ontario Public Service Employees Union (Respondent) v. C.M. Hincks Treatment Centre (Intervener)

Unit: "all office, clerical and technical employees of C.M Hincks Treatment Centre in Toronto, save and except the office manager, those above the rank of office manager and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period It is mutually understood and agreed that the positions of administrative assistant to the Director of Finance, administrative assistant to the Medical Director and Psychometrist are excluded from the bargaining unit" (9 employees in unit) (*Dismissed*)

Number of persons listed as eligible	9
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	5

**3467-91-R:** Leonard Steeves, Hubert O'Brien (Applicant) v. Retail Whole Sale Dairy & General Workers Union AFL-CIO-CLC and Its Local 440 (Respondent) v. St. Lawrence Starch Company Limited (Intervener) (*Withdrawn*)

**3566-91-R:** Jose Manuel Darosa (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081, 1089 (Respondent) v. Armor Masonry & Precast Ltd. (Intervener) (*Withdrawn*)

**3630-91-R:** Mary Nikou, Tony Rosati (Applicant) v. Retail, Wholesale and Department Store Union AFL-CIO-CLC and its Local 1000 (Respondent) v. Seligman and Latz of Polo Park Limited (Intervener) (*Withdrawn*)

**3669-91-R:** Raymond Champlain, on behalf of a group of employees of 503382 Ontario Limited, carrying on business as Blackburn Villa (Applicant) v. United Steelworkers of America (Respondent) v. Marcel Parent (Intervener) (*Terminated*)

**3861-91-R:** Leonard Steeves, Hubert O'Brien (Applicants) v. Retail Whole Sale Dairy & General Workers Union AFL-CIO-CLC and its Local 440 (Respondent) v. St. Lawrence Starch Company Limited (Intervener) (*Withdrawn*)



**3883-91-R:** Group of Employees of Dusk Campbell Ltd., Paul Summers, Ron Flunder (Applicant) v. Service Employees Union, Local 183 (Respondent) v. Dussek Campbell Limited (Intervener) (*Granted*)

**3947-91-R:** Tony Rosati & Mary Nikou (Applicant) v. Retail, Wholesale and Department Store Union, AFL-CIO:CLC and its Local 1000 (Respondent) v. Seligman and Latz of Polo Park Limited (Intervener) (2 employees in unit) (*Granted*)

**4018-91-R:** Duane Thibert (Applicant) v. Teamsters Local 424 (Respondent) v. Niagara Falls Union Centre (Intervener) (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**0768-88-U:** National Elevator and Escalator Association (Complainant) v. International Union of Elevator Constructors, International Union of Elevator Constructors Local 50, International Union of Elevator Constructors, Local 90, International Union of Elevator Constructors, Local 96 (Respondents) (Intervener) (*Dismissed*)

**2360-88-U:** United Brotherhood of Carpenters and Joiners of America, Local Union 27 (Complainant) v. Hanson Development Group (Respondent) (*Withdrawn*)

**1732-89-U:** The Canadian Union of Public Employees Local 1230 Full-Time and Part-time Bargaining Unit (Complainant) v. The Governing Council of the University of Toronto (Respondent) (*Withdrawn*)

**0176-90-U:** Cement, Lime, Gypsum And Allied Workers Division of International Brotherhood of Boilermakers, Iron Ship Blacksmiths, Forgers And Helpers (Complainant) v. Hamilton Automatic Vending Company Ltd. (Respondent) (*Withdrawn*)

**0344-90-U:** Ron Murduff (Complainant) v. The Retail, Wholesale And Department Store Union, Local 414 , National Grocers Co. Ltd. (Respondents) (*Dismissed*)

**0902-90-U:** Kermit Mitchell (Complainant) v. Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)

**0951-90-U:** Brent Dwayne Heppell (Complainant) v. Doug Anderson (Service Employees International Union Local 204) Business Agent (Respondent) (*Withdrawn*)

**3016-90-U:** C.U.P.E. Local 1230 (Complainant) v. The Governing Council of the University of Toronto (Respondent) (*Withdrawn*)

**3024-90-U:** Frank T. Prindler (Complainant) v. R.W.D.S.U. 414 (Respondent) v. Dick Kelly (Intervener) (*Dismissed*)

**3083-90-U:** Mark Worley (Complainant) v. Frank Rivait, C.A.W. Local 444 Union Rep. (Respondents) (*Withdrawn*)

**3168-90-U:** Yiannakis Karnaos (Complainant) v. Iva Casun, Miro Viky, and c/o American Standard and Ralph Peach (Union Chief Steward) c/o Local 231 (Respondent) (*Withdrawn*)

**3289-90-U:** Bakery Confectionery & Tobacco Workers International Union, Local 264 (Complainant) v. Dare Foods Limited (Biscuit Division) (Respondent) (*Withdrawn*)

**0191-91-U:** Debbie Bruzzese (Complainant) v. Bradshaw Stradwick Inc. & Western Ontario Joint Board Amalgamated Clothing & Textile Workers' Union (Respondents) (*Withdrawn*)

**0387-91-U:** Ontario Nurses' Association (Complainant) v. The Municipality of Metropolitan Toronto (Respondent) v. Canadian Union of Public Employees, Local 79 (Intervener) (*Dismissed*)

**0655-91-U:** Ontario Public Service Employees Union (Complainant) v. Cybermedix Health Services Limited (Respondent) v. Canadian Medical Laboratories Limited (Intervener) (*Withdrawn*)

**0814-91-U:** Service Employees Union, Local 210 (Complainant) v. The Windsor And Essex County Real Estate Board (Respondent) (*Withdrawn*)

**0985-91-U:** International Brotherhood of Painters and Allied Trades (Complainant) v. Guillot Builders Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Retail, Wholesale and Department Store Union (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

**1063-91-U:** Randy Carbone (Complainant) v. UPGWA Union (Respondent) (*Withdrawn*)

**1081-91-U:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Complainant) v. Guillot Builders Limited (Respondent) v. Retail, Wholesale and Department Store Union, International Brotherhood of Painters and Allied Trades (Intervener) (*Withdrawn*)

**1532-91-U:** Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. Amorim Enterprises Ltd. (Respondent) (*Withdrawn*)

**1864-91-U:** Ontario Public Service Employees Union (Complainant) v. Cybermedix Health Services Limited (Respondent) (*Dismissed*)

**1917-91-U:** C. Davidson, Joseph Ciccio (Complainants) v. A.C.T.W.U. Local 1305 (Peter Raso) (Respondent) (*Withdrawn*)

**2181-91-U:** The Ontario Secondary School Teachers' Federation (Complainant) v. The West Parry Sound Board of Education (Respondent) (*Withdrawn*)

**2207-91-U:** Ontario Liquor Board Employees' Union (Complainant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

**2249-91-U:** Jerry R. Taillefer (Complainant) v. United Brotherhood of Carpenters & Joiners of America Local 494, Windsor, Ont. (Respondent) (*Withdrawn*)

**2508-91-U:** Retail, Wholesale and Department Store Union AFL:CIO:CLC (Complainant) v. Hully Gully (London) Limited (Respondent) (*Withdrawn*)

**2692-91-U:** Mark Herrington (Complainant) v. Canadian Union of Public Employees Local 2840 (Respondent) v. The Board Of Governors Of Exhibition Place (Intervener) (*Dismissed*)

**2695-91-U:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. James A. Rice Ltd. (Respondent) (*Withdrawn*)

**2883-91-U:** International Ladies' Garment Workers' Union (Complainant) v. Simmons Canada Inc. (Respondent) (*Withdrawn*)

**2958-91-U:** Hotels, Clubs, Restaurants Taverns Employees Union, Local 261 (Complainant) v. 595578 Ontario Limited (Respondent) (*Withdrawn*)

**3245-91-U:** Brewery, Malt & Soft Drink Workers, Local 304 (Complainant) v. Wieland Electric Incorporated (Respondent) (*Dismissed*)

**3246-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. The Brick Warehouse Corporation (Respondent) (*Withdrawn*)

**3268-91-U; 3280-91-U:** Energy & Chemical Workers Union, Local 571 (Complainant) v. United Food & Com-

mercial Workers Union, Locals 175/633 and Jim Crockett, President of U.F.C.W. Locals 175/633 (Respondent) (*Withdrawn*)

**3279-91-U:** Energy & Chemical Workers Union, Local 571 (Complainant) v. United Food & Commercial Workers Union, Locals 175/633 and Jim Andress (Respondent) (*Withdrawn*)

**3305-91-U:** The Canadian Union of Blind and Sighted Merchants, Local 681 (Complainant) v. Servifood Limited (Respondent) (*Withdrawn*)

**3383-91-U:** Canadian Union of Public Employees and its Local 1614 (Complainant) v. The Corporation of the City of Nanticoke (Respondent) (*Withdrawn*)

**3385-91-U:** Canadian Union of Public Employees and its Local 2457 (Complainant) v. The Corporation of the City of Nanticoke (Respondent) (*Withdrawn*)

**3389-91-U:** Mrs. Sislyn Prince (Complainant) v. IBEW & Electrohome - Plant 3 (Respondents) (*Withdrawn*)

**3415-91-U:** Ontario Nurses' Association (Complainant) v. Victorian Order of Nurses, (York Region) (Respondent) (*Withdrawn*)

**3434-91-U:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Complainant) v. Coldmatic-Refrigeration of Canada Ltd. and General Refrigeration Inc. (Respondents) (*Granted*)

**3448-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. The Brick Warehouse Corporation (Respondent) (*Withdrawn*)

**3456-91-U:** Armando Amicone (Complainant) v. "GMP" - Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO-CLC Local 64 (Respondent) (*Withdrawn*)

**3478-91-U:** The Canadian Union of Educational Workers (Complainant) v. The University of Ottawa (Respondent) (*Withdrawn*)

**3479-91-U:** Canadian Union of Educational Workers and its Local 6 (Complainant) v. McMaster University (Respondent) (*Withdrawn*)

**3487-91-U:** Betty E. Rocco (Complainant) v. Office and Professional Employees International Union Local 343 (Respondent) v. CAW Legal Services Plan (Intervener) (*Withdrawn*)

**3492-91-U:** United Brotherhood of Carpenters and Joiners of America Local Union 1425 (Complainant) v. Midan Mechanical Contractors Inc. (Respondent) (*Withdrawn*)

**3509-91-U:** Cynthia Duhaney (Complainant) v. Ford Motor Company (Respondent) (*Withdrawn*)

**3520-91-U:** Canadian Union of Public Employees and its Local #161 (Complainant) v. Laurentian Hospital (Respondent) (*Withdrawn*)

**3533-91-U:** Ema Cardoso-Lee (Complainant) v. Benefit Plan Administrators Limited (Respondent) (*Withdrawn*)

**3546-91-U:** Paul Presley (Complainant) v. C.A.W. Local 1967 (Respondent) (*Withdrawn*)

**3547-91-U:** Adrian J. Ryan (Complainant) v. Norm Younger (Respondent) (*Withdrawn*)

**3570-91-U:** Pierre Bertrand (Complainant) v. CUPE Local 503 (Respondent) v. The Regional Municipality of Ottawa-Carleton (Intervener) (*Withdrawn*)



**3589-91-U:** Office and Professional Employee's International Union, Local 81 (Complainant) v. McKellar General Hospital (Respondent) (*Withdrawn*)

**3595-91-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 251 (Complainant) v. Fabco Fabricated Steel Products, Division of Indal Ltd. (Respondent) (*Withdrawn*)

**3609-91-U:** Local 4025, United Steelworkers of America, Bill Bradley, Hugh Scott, Rudy Buddingh, Angelo Colella, Jack Crombie, Eddie Knakowski, Lou Ljubicic, Bart Mcquillan, Nicola Paolicelli, Frank Scarsellone, Karl Singer, Jeff Trueman (Complainants) v. Crown Cork & Seal Canada Inc. (Respondent) (*Withdrawn*)

**3610-91-U:** Virpal K. Brar (Complainant) v. Alice Vivian, Local Stewart and Amalgamated Clothing and Textile Workers Union, Local 740 (Respondents) (*Withdrawn*)

**3633-91-U:** Alexander M. Joseph (Complainant) v. Alliance Ballasts (Respondent) (*Withdrawn*)

**3644-91-U:** Elio Crea (Complainant) v. Bakery, Confectionery and Tobacco Workers International Union C.L.C. Local 322, Mr. Claude Beaudry (Respondents) (*Withdrawn*)

**3670-91-U:** Steven Greenfield (Complainant) v. CUPE 576 & Labour Relations (Ottawa Civic Hospital) (Respondents) (*Withdrawn*)

**3701-91-U:** Patrick Sarjeant (Complainant) v. CAW TCA Canada Local 707 (Respondent) (*Withdrawn*)

**3707-91-U:** Service Employees' Union, Local 210 (Complainant) v. Leamington District Memorial Hospital (Respondent) (*Withdrawn*)

**3716-91-U:** Delores Gulinski (Complainant) v. U.F.C.W. Local 175 and, Rick Dybvig (Respondents) (*Withdrawn*)

**3758-91-U:** Kenneth Van Raay, (Complainant) v. The International Association of Machinists and Aerospace Workers District #184 Lodge #1703 (Respondent) (*Withdrawn*)

**3763-91-U:** Canadian Union of Public Employees and its Local 1023 (Complainant) v. Sudbury General Hospital (Respondent) v. K. Martel (Intervener) (*Withdrawn*)

**3770-91-U:** Linda Macdonald (Complainant) v. Jim Burshaw (President Local #1022) & CUPE Local #1022 (Respondents) (*Withdrawn*)

**3787-91-U:** Pierre Bernier (Complainant) v. Labourers' International Union of North America Local Union 493 (Respondent) (*Withdrawn*)

**3802-91-U:** Brewery, Malt and Soft Drink Workers, Local 304, (Complainant) v. Conner Group Homes (Respondent) (*Withdrawn*)

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**3898-91-U:** The Ontario Secondary School Teachers' Federation (Complainant) v. Windsor Board of Education (Respondent) (*Withdrawn*)

**3910-91-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Complainant) v. Westin Hotel Company Limited (Respondent) (*Withdrawn*)

**3918-91-U:** Jessica Dorcas Isaac (Complainant) v. Mr. Eugene Shapka (Respondent) (*Dismissed*)

**3953-91-U:** Retail, Wholesale And Department Store Union, AFL:CIO:CLC (Complainant) v. The Brick Warehouse Corporation (Respondent) (*Withdrawn*)

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**3477-91-M:** Kenneth J. Kupisz P. Eng. (Applicant) v. Society of Ontario Hydro Professional and Administrative Employees, Ontario Hydro (Respondents) (*Withdrawn*)

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**3880-91-M:** 723779 Ontario Limited, carrying on business as Strano Foods (formerly Strano Foods Limited) (Employer) v. Christian Labour Association of Canada (Respondent) (*Granted*)

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**2873-91-JD:** Millwright District Council of Ontario, on its own behalf and on behalf of Local 1244 (Complainant) v. Nicholls-Radtke & Associates Limited, International Association of Bridge, Structural and Ornament-

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**3186-91-OH:** Deborah Belisle (Complainant) v. Rena Long, Publisher of Thunder Bay Post (Respondent) (*Withdrawn*)

**3522-91-OH:** Kevin Egan (Complainant) v. Mag Facilities Group (Respondent) (*Withdrawn*)

**3534-91-OH:** Richard Claros, Mostafa Dabirian (Complainants) v. Delsan Demolition Limited (Respondent) v. Labourers' International Union of North America, Local 837 (Intervener) (*Withdrawn*)

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**0648-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. 615949 Ontario Limited c.o.b. as Eagle Contracting Limited and/or, Caledon Royal Construction Limited and/or, 615949 Ontario Limited c.o.b. as Eagle Contracting Limited and Caledon Royal Construction Limited (Respondents) (*Granted*)

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**1761-91-G:** United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Dean Construction Company Ltd. (Respondent) (*Withdrawn*)

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**2469-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Nicholls-Radtke & Associates Limited (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244 (Intervenors) (*Withdrawn*)

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**2602-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Colautti Construction Ltd. (Respondent) (*Withdrawn*)

**2664-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Limited (Respondent) (*Granted*)

**2667-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Nicholls Radtke & Associates Limited (Respondent) (*Withdrawn*)

**2744-91-G:** International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Ultra Masonry Ltd. (Respondent) (*Granted*)

**2748-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Conpour Services Ltd. (Respondent) (*Granted*)

**2882-91-G:** Labourers' International Union of North America, Local 1036 (Applicant) v. Newman Construction (Respondent) (*Withdrawn*)

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**3378-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Andrew Paving & Engineering Ltd. (Respondent) (*Withdrawn*)

**3562-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. San-Lee Construction Ltd. (Respondent) (*Granted*)

**3565-91-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. 578285 Ontario Ltd. Operating as Landar Insulation (Respondent) (*Granted*)

**3578-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. George Wimpey Canada Ltd. (Respondent) (*Withdrawn*)

**3597-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Bird Construction (Respondent) (*Granted*)

**3604-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. F. D'Angelo Drywall Systems Ltd. (Respondent) (*Granted*)

**3608-91-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Whitby Steel (Respondent) (*Granted*)

**3612-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. B. Gerlach and Son Enterprises Ltd. (Respondent) (*Granted*)

**3632-91-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. T.W. Broome Ltd. (Respondent) (*Granted*)

**3641-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Bona Vista Sheet Metal (Respondent) (*Withdrawn*)

**3681-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Spie Construction Inc. (Respondent) (*Withdrawn*)

**3699-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Spencer Construction (Respondent) (*Granted*)

**3715-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Delmar Contracting Ltd. (Respondent) (*Granted*)

**3719-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Professional Carpentry (Respondent) (*Dismissed*)

**3721-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. B.J. Normand Limited (Respondent) (*Withdrawn*)

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**3733-91-G:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Sudbury Carpetland and Home Interiors Limited (Respondent) (*Granted*)

**3735-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Eric Fabricius and 568295 Ontario Limited c.o.b as North Mechanical (Respondent) (*Granted*)

**3746-91-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Eastern Construction Company Limited (Respondent) (*Granted*)

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**3786-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Willjim Contracting and Mechanical Ltd. (Respondent) (*Withdrawn*)

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**3832-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mavi Drywall Systems Ltd. (Respondent) (*Granted*)

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*Ontario Labour Relations Board,  
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

May 1992





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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

Cited [1992] OLRB REP. MAY

EDITOR: RON LEBI

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also reported in *Canadian Labour Relations Boards  
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Construction Industry - Bargaining Unit - Termination - Applicant and supporting employees not members of the union and not hired through the hiring hall - Whether employees bringing the termination application entitled to support and bring the application - Board regarding reasoning in *April Waterproofing* decision applicable - Application dismissed

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POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... 662

Sale of a Business - Construction Industry - Related Employer - Woodwork company sold by "F"  
 going bankrupt - "F" incorporating new company, purchasing some of bankrupt company's  
 equipment and carrying on substantially same business - Board finding "F" to be "key per-  
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ECONOMY STORE FIXTURES LIMITED AND FLAIR WOODWORKING LTD.;  
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POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... 662

Termination - Bargaining Unit - Construction Industry - Applicant and supporting employees not  
 members of the union and not hired through the hiring hall - Whether employees bringing  
 the termination application entitled to support and bring the application - Board regarding  
 reasoning in *April Waterproofing* decision applicable - Application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE PAUL MCCONACHIE AND U.A.,  
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Trade Union - Certification - Employees not meeting eligibility requirements of union's constitu-  
 tion - Union not having established practice of admitting persons to membership without  
 regard to eligibility requirements of constitution - Application dismissed

ST. CATHARINES HYDRO ELECTRIC COMMISSION; RE CAN WORKERS FED-  
 ERAL UNION, LOCAL 354, CANADIAN LABOUR CONGRESS; RE I.B.E.W. .... 638

Trusteeship - Practice and Procedure - Board receiving April 1992 letter from General Secretary  
 of International Union stating that local placed under trusteeship in April 1991 - Board  
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 directing International Union to bring its request to the attention of Local members - Mem-

bers to have six weeks to advise Board in writing whether or not they oppose International's request

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION 834, TORONTO, ONTARIO .....

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Unfair Labour Practice - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Remedies - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the Act

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Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Union filing lengthy reply to employee's complaint and asking that it be dismissed without a hearing on a number of grounds - Complainant directed to respond to union's reply and to address certain concerns raised in complaint within 30 days

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**0128-92-R** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario, Applicant v. 419990 Ontario Ltd. c.o.b. as **A.B.S. Masonry**, Respondent v. Bricklayers Masons Independent Union of Canada Local 1, Intervener

**Bargaining Unit - Certification - Construction Industry - Pre-Hearing Vote - Parties disputing whether intervener having valid collective agreement with employer - Applicant asking that, in addition to standard question on displacement application, ballot contain standard question on certification application - Board noting that it would be confusing and inappropriate to attempt to "cover all the bases" in vote by asking series of questions - Board concluding that given appearance of displacement application, usual question on displacement application, and only that question, to be asked on ballot**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

**DECISION OF THE BOARD;** May 13, 1992

1. The name of the respondent is amended to read: "419990 Ontario Ltd. c.o.b. as A.B.S. Masonry".
2. This is an application for certification.
3. The applicant has requested that a pre-hearing representation vote be taken.
4. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.
5. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:
  1. all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
  2. all bricklayers' assistants in the employ of the respondent, in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.
6. The parties remain in dispute over a number of matters, including the appropriate bargaining unit with respect to what will be bargaining unit #2, challenges to the list with respect to both the voting constituencies and their respective bargaining units, and over whether the instant application is a displacement application for certification or not (the applicant takes the position

that the intervener does not have a valid collective agreement with the respondent employer). Their respective positions are set out in the officer's Pre-Hearing Vote Meeting Report.

7. Because it takes the position that the intervener does not have a valid collective agreement, the applicant asserts that the instant application is not a displacement application. It asks that the ballot with respect to voting constituency #2, in addition to the standard question on a displacement application (whether the voters wish to be represented by the applicant or the intervener trade union) also ask whether or not voters wish to be represented by the applicant in their employment relations with the respondent. In this manner, the applicant submits, the correct question will have been asked on the ballot, regardless of the eventual resolution of the disputed issues. In turn, the intervener objects to the holding of a pre-hearing vote prior to a hearing to resolve these matters.

8. As the Board has stated on numerous occasions, when the applicant files a certification application in which it requests that a pre-hearing representation vote be taken, the Board moves expeditiously to give effect to that request, and hold a representation vote, and it does so without resolving the disputes raised by the parties, unless absolutely essential to do so before the vote can be directed. In is only in extremely rare situations that an issue will be raised that must necessarily be resolved prior to the direction of the vote.

9. Here, there is no reason to delay the vote in order to hold a hearing to resolve the issues raised by the parties. Although the issues they raise will lead us to segregate the challenged ballots, and direct that the ballot boxes in both voting constituencies be sealed pending further direction of the Board, they are not a reason to delay the ordering of the vote. Further, although there may be situations where votes are directed in more than one voting constituency (for example, see *Grant Forest Products* OLRB Reports [1990] Jan. 45), within a particular voting constituency, the ballot will generally only set out one question to be answered by voting employees. The applicant is understandably concerned that the vote it has requested ask all the questions that might, in the result, be necessary, depending on the resolution of the various disputes raised by the parties. But that is not the purpose of deciding on the appropriate voting constituency, voter eligibility, and the questions to be set out on the ballot. The applicant chose to file the instant application as a request for a pre-hearing representation vote, and is taken to know the practice of the Board, as directed by the legislation, when such a representation vote is requested. The vote is held prior to the resolution of the sorts of disputes raised in the instant application. It would be confusing and inappropriate to attempt to "cover all the bases" in the vote by asking voters a series of questions, in an effort to cover all the possible permutations that might result from the resolution of disputed issues. Rather, as this appears to be a displacement application, the usual question on a displacement application, and only that question, will be asked on the ballot with respect to voting constituency #2.

10. All those employed in the voting constituency on April 23, 1992, who are so employed on the date the vote is taken will be eligible to vote.

11. Voters, in each voting constituency, will be asked to indicate whether or not they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

12. The ballot boxes with respect to both voting constituencies will be sealed, until the Board otherwise directs. In addition, the ballots of those subject to challenge in voting constituency #1 will be segregated, and all the ballots in voting constituency #2 will be segregated, again until the Board otherwise directs.

13. The matter is referred to the Registrar.
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**2841-88-JD** Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244, Complainant v. **Acco Canadian Material Handling**, a Division of Babcock Industries Canada Inc. and Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Respondents

**Construction Industry - Jurisdictional Dispute - Work in connection with installation of monorail conveyor system in dispute - Millwrights seeking exclusive assignment of work in dispute, but Ironworkers seeking assignment to their members as part of crew made up of equal numbers of members of both unions - While three of the four non-neutral criteria pointing to assignment of work to Millwrights, Board satisfied by evidence as a whole, and particularly evidence surrounding area past practice, that work should be assigned to composite crew**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *S. Weslak*.

**APPEARANCES:** *N. L. Jesin*, *J. D. Watson* and *H. Martinak* for the complainant; *Fred Heerema* and *Anthony H. Allen* for Acco Canadian Material Handling, a Division of Babcock Industries Canada Inc.; *S.B.D. Wahl* and *F. Marr* for Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700.

**DECISION OF THE BOARD;** May 12, 1992

1. This is a work assignment complaint made under section 93 [formerly section 91] of the *Labour Relations Act*. For ease of reference, the Board will refer to the complainant as "the Millwrights Council or the complainant", to its Local 1244 as "Millwrights Local 1244", to the respondent trade unions as the "Ironworkers Council" and "Ironworkers, Local 700", and to the respondent employer as "Acco". When it is necessary to refer to the union parties collectively, the Board will refer to them as "the Millwrights" and "the Ironworkers", respectively.

2. The complaint was brought as a defence to a referral of a grievance made by Ironworkers, Local 700 against Acco in which the union alleged that Acco had failed to hold a pre-job mark-up meeting and notify Ironworkers, Local 700 of the job at least twenty-four hours prior to commencing work on it. When that grievance came before the Board, differently constituted, the application was adjourned pending the outcome of this complaint.

3. When the complaint first came before this panel of the Board for a hearing on July 17, 1989, the parties disagreed about the description of the work in dispute and about the kind of work on which the Board should hear evidence respecting Acco's past practice and the past practice of other contractors who employed either or both trades, and the geographic scope of the past practice evidence. The past practices of the employer who has made the disputed assignment (referred to as "employer past practice") and the practice of other employers (referred to as "area past practice") who have performed the work are two of several criteria usually considered by the Board in deciding work assignment disputes.



4. The Board heard and considered the parties' submissions on these issues and decided that the work in dispute was:

all work in connection with the installation of a monorail conveyor system known as a monovoyer at the newly constructed Magna plant in Maidstone, Ontario.

The Board also decided that it would receive past practice evidence about the installation of two types of conveyor systems: monorail systems and package conveyor systems. For purposes of Acco's past practice, the evidence would be with respect to jobs performed by Acco in the province of Ontario. For purposes of area past practice, the evidence would be limited to jobs performed in the counties of Essex and Kent which comprise Board Area #1 for the construction industry provisions of the Act. While the work in dispute was described in terms of a monorail conveyor system, it was the Board's view that allowing past practice evidence respecting the two types of conveyor systems would include a sufficient variety of conveyors which might arguably be included in the term "monorail conveyor" and would allow the parties full opportunity to present their evidence and make their submissions respecting the conclusions to be drawn by the Board from past practice evidence.

5. The evidence and submissions of the parties were received over thirty-three days of hearing between January 16, 1990 and July 3, 1991, including four days of legal argument beginning April 15, 1991. The Board heard the testimony of twenty witnesses and received ninety-five documents in exhibit. The Board's conclusions have been made having regard to the *viva voce* and documentary evidence, the Board's assessment of the credibility of the witnesses and the submissions of the parties on how the Board should interpret and apply the evidence in order to determine the proper assignment of the work in dispute.

6. The evidence predominantly related to area past practice and employer past practice, but included evidence about other criteria relied on by the Board to assist it in resolving conflicting work jurisdiction claims. A substantial amount of the other evidence related to the criterion of work jurisdiction arrangements between the Millwrights and the Ironworkers. Some of the area past practice evidence dealt with jobs which were performed some thirty to thirty-five years before this complaint was made and for obvious reasons lacks the specificity of some of the more recent evidence. It has little value, therefore, except for providing an historical point of departure for what the Ironworkers claim is the common area past practice of performing all on-site work associated with the installation of monorail and package conveyor systems with a crew composed of equal numbers of members of Millwrights Local 1244 and Ironworkers Local 700 without limitation of the work functions performed by members of either trade. That kind of crew will be referred to in this decision as a "balanced composite crew".

7. As the Board has already noted, it uses a variety of criteria to assist it in resolving disputes over the work jurisdiction claims of trade unions. Having regard to the evidence before it and the submissions of the parties, the Board finds the following criteria to be appropriate for resolving this dispute:

collective bargaining relationships;

work jurisdiction claims defined in collective agreements and the constitutions of the Millwrights and Ironworkers;

work jurisdiction arrangements between the Millwrights and Ironworkers;

skills, training and safety;

- efficiency and economy in performing the work in dispute;
- employer past practice;
- employer preference;
- area past practice.

The parties referred to these criteria in making their submissions. The Board will not attempt to summarize either the copious evidence or the parties' submissions as to the conclusions which the Board should reach on the evidence. Instead, having assessed the evidence and the parties' submissions, the Board proposes to deal separately with conclusions of fact relative to each criterion and, as needed, will discuss particular, relevant elements of the evidence in considering the various criteria.

### Collective Bargaining Relationships

8. Acco has a collective bargaining relationship with each of the Millwrights and the Ironworkers. It is bound together with the Millwrights Council and Millwrights Local 1244 to the collective agreement between the Association of Millwrighting Contractors of Ontario Inc. and the Millwrights Council. It is also bound together with the Ironworkers Council and Ironworkers Local 700 to the collective agreement between the Ontario Erectors Association, Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers Council. Each of these collective agreements is a provincial agreement as defined in subsection 139(1) [formerly subsection 137(1)] of the Act and, therefore, is a collective agreement which applies in the industrial, commercial and institutional ("ICI") sector of the construction industry in Ontario. The Board will refer to them respectively as "the Millwrights Agreement" and "the Ironworkers Agreement". There is a lengthy history of collective bargaining between these bargaining parties and, prior to province-wide bargaining in the ICI sector, their predecessors in local bargaining. Therefore, the collective bargaining relationship between Acco and the Millwrights and Ironworkers does not favour assignment to members of either Millwrights Local 1244 or Ironworkers Local 700.

### Work Jurisdiction Claims Defined in Collective Agreements and Constitutions

9. The Millwrights Agreement has a trade jurisdiction clause which, amongst other things contains a claim to the installation of conveyors and monorails. The description of the trade jurisdiction claim by the Ironworkers in Appendix "A" of the Ironworkers Agreement contains, amongst other things, a claim to the application, erection and construction of conveyors and monorails. In addition, the parties to the Ironworkers Agreement have agreed at Article 1.5 that the Ironworkers Agreement applies to all employees of employers covered by the agreement performing the following work:

- (a) The field fabrication, erection, installation, welding, demolition, revision, repair and dismantling of all structural and miscellaneous steel, header steel, bridging steel, all supports including but not limited to pipe-supports, electrical-supports, duct-supports and like structural members, prefabricated or fabricated on, during and/or after the completion of the job, ...
- . . .
- (c) The rigging, moving, handling, dismantling, assembling, placing and repair of all machinery and equipment including the erection, installation, and dismantling of conveyors, mono rails and overhead cranes.

10. The Millwrights are governed by the Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America. The work jurisdiction claim in Section 7 - Trade Autonomy of the constitution contains no express reference to either conveyors or monorails, notwithstanding the claim to the installation of conveyors and monorails contained in the Millwrights Agreement. The Board notes that Section 25 - Jurisdiction and Powers of Local Unions of the Constitution states that the trade jurisdiction of any Local Union or Council may not be changed without the written approval of the General President. There is no evidence that the General President has given written approval to the Millwrights Council or to Millwrights Local 1244 to claim jurisdiction over the installation of conveyors. Article IV - Jurisdiction of the Constitution of the International Association of Bridge, Structural and Ornamental Ironworkers expressly claims for its members "...the fabricating, production, erection and construction of all ... conveyors ... [and] monorails ...".

11. Insofar as both collective agreements make some provision upon which the Millwrights and the Ironworkers can base a claim to the work in dispute, the work jurisdiction claims in the collective agreements do not favour assignment to members of either Millwrights Local 1244 or Ironworkers Local 700. While the express reference in the Ironworkers constitution to the installation, etc., of conveyors and monorails and the absence of any express reference to that work in the Millwrights constitution would appear to favour slightly the Ironworkers' claim to jurisdiction over the work in dispute, Ironworkers Local 700 acknowledges the claim of Millwrights Local 1244 to perform conveyor work, but not exclusively and not severably from the Ironworkers. Thus the constitutions do not favour either union's claim to the work. In the result, the criterion of work jurisdiction claims defined in collective agreements and constitutions do not favour assignment of the work in dispute to the members of either union.

#### Jurisdictional Arrangements Between the Unions

12. There is an agreement between the United Brotherhood of Carpenters and Joiners of America and the International Association of Bridge, Structural and Ornamental Ironworkers which deals with conveyors ("the Conveyor Agreement"). It is dated June 3, 1953 and has been approved by the General Executive Council of the Ironworkers International and by the General Executive Board of the Carpenters International. Its purpose includes the object of settling jurisdictional disputes directly between the two trades and it contains the following references to the two types of conveyor systems about which the Board ruled that it would hear past practice evidence.

##### 1. Monorails

The erection and installation of steel members from which hangers and monorails are suspended or supported is work of Iron Workers. All structures for housing, such as bridgework or free standing supports, are to be work of the Iron Workers. The erection and installation of hangers and monorails is work of the Millwrights.

##### 2. Package Conveyors

Package conveyors covered by this section are designed to carry unit loads such as corrugated cartons, wooden or paper boxes, cloth or paper bags, tote boxes carrying small parts, barrels, crates, bundles, bales, or individual items such as artillery shells, refrigerators, television sets, radios. These conveyors are typically installed in such industries as food processing, breweries, department stores, electrical manufacturing, and similar industries.

The entire installation of all package handling conveyors to convey a unit load of five hundred (500) pounds or under, and all necessary hangers, legs, and supports required for the installation, but not a part of the building structure, is work of the Millwrights.



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#### 6. Miscellaneous

The erection and installation of walkways, catwalks and gratings in connection with conveyor installations is work of the Iron Workers.

Field fabrication of all conveyor work assigned to the jurisdiction of the respective trades by this agreement shall be performed by such trade.

The erection of protective screen or metal guards shall be the work of the trade installing the conveyors.

#### INTERPRETATION OF CONVEYOR AGREEMENT

1. In regard to monorails: Framework suspended by hangers to carry turns, take-ups, drives, or switches is work of the Millwrights.

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6. All aligning is work of the Millwrights on June 5, 1957.

The same parties executed a Memorandum of Agreement as a "Clarification of Conveyor Agreement" ("the Memorandum"). The preamble of the Memorandum states that it "... clarifies and supplements ..." the Conveyor Agreement. The following parts of the Memorandum are relevant to the provisions of the Conveyor Agreement quoted above.

#### I

The following provisions concern Section 1 of the Agreement of June 22, 1953, on Monorails:

1. All monorails, regardless of trade names, are to be the work of Millwrights in accordance with Section 1 of the Agreement of June 22, 1953.

2. When no holes are required to erect headers, it is the work of Millwrights to lay out and fabricate hanger holes.

3. When the fabrication of holes in headers to receive hangers is performed at the same time as the fabrication of other holes in the headers required to erect the headers, and when such fabrication requires eight or less man-hours, the fabrication of the holes is the work of Iron Workers.

When more than eight man-hours is required to lay out, drill, punch or burn holes in headers required to erect the headers and hangers, a composite crew composed equally of Millwrights and Iron Workers are to work on all holes in such headers.

4. All holes drilled, punched or burned into a header to receive hangers after headers have been erected by Iron Workers are to be drilled, punched or burned by Millwrights.

5. Hangers to be attached to headers prior to the erection of headers will be attached to the headers by Millwrights.

6. When intermediate headers cannot be installed at the time other headers are being erected by Iron Workers on turns, take-ups and drives, the headers shall be fabricated by Iron Workers and installed by Millwrights.

7. The installation of all headers for the purpose of supporting monorails when suspended by rods is the work of Millwrights.

8. The installation of all headers for the purpose of supporting monorails when suspended by angles, channels or beams is the work of Iron Workers.

9. When a rigging beam is a part of the building design and is included in the blueprints of the building structure and is erected with the building steel, the rigging beam is the work of Iron Workers. When the rigging beam is not a part of the building design and is not included in the blueprints of the building structure and is not erected with the building steel, then the rigging beam is the work of Millwrights. A rigging beam shall be defined as a beam that supports a hoisting device used solely for repairing, servicing and periodic inspections of mechanical equipment and machinery.

## II

The following provision concerns Section 2 of the Agreement of June 22, 1953, [Conveyor Agreement] on Package Conveyors:

1. The installation of header beams to support package conveyors designed for a unit load of 500 pounds or less under paragraph 2 of the agreement of June 22, 1953, [Conveyor Agreement] is the work of Millwrights. Thus, when package conveyors are designed for a unit load of 500 pounds or less to be suspended from the headers shown in picture number 3 in the printed agreement of June 22, 1953, [Conveyor Agreement] the installation of such headers is the work of Millwrights. When headers are a part of the building structure or are installed in connection with package conveyors designed for a unit load of over 500 pounds, the installation of the headers is the work of Iron Workers.

## V

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1. The erection of protective screen or metal guard in connection with monorails is the work of Millwrights. The erection of protective screen or metal guards in connection with package conveyors designed to carry unit loads of 500 pounds or under is the work of Millwrights.

2. The erection of protective screen guards or other than metal guards on all other types of conveyors is the work of Millwrights.

The erection of metal guards (other than protective screen guards) on all other types of conveyors is the work of Iron Workers.

3. Machinery guards in connection with conveyors is the work of Millwrights.

13. Each of the Carpenters International and the Ironworkers International has reprinted the Conveyor Agreement and the Memorandum in handbooks containing similar types of agreements which each has made with other trade unions and which each distributes to contractors from time to time. In fact, Mr. Tony Allen, Acco's Installation Manager who represented Acco in these proceedings, was given a copy of the Ironworkers' handbook by one of its representatives who visited Mr. Allen at the project where the work in dispute was being performed.

14. The trade jurisdiction claims set out in Article 4 of the Ironworkers International's constitution are made subject, by that article, to trade agreements like the Conveyor Agreement. The Millwrights Agreement expressly obligates contractors who are bound by it to abide by trade agreements on work jurisdiction made between the Carpenters International and other international trade unions. No similar express obligation is contained in the Ironworkers Agreement.

15. Acco relied on the Conveyor Agreement and the Memorandum in making its original assignment of the work in dispute exclusively to members of Millwrights Local 1244, although the Board notes that Acco later employed two members of Ironworkers Local 700 on the project after Allen had held separate discussions with representatives of the two unions. Acco also relies on them when it assigns conveyor work on projects throughout Ontario. In the Metropolitan Toronto area, however, Acco recognizes what it believes to be an understanding between the Millwrights

Council and the Ironworkers Council for projects at General Motors, Ford and Chrysler facilities, that conveyor installations will be made by a balanced composite crew. In addition, Acco has accepted agreements of representatives of the two unions to assign conveyor work on particular projects on some basis other than the Conveyor Agreement and Memorandum. There is evidence that two other conveyor contractors from outside of Board Area #1 and two Windsor-based contractors have relied on the Conveyor Agreement to assign conveyor work in that Board Area, but not monorail conveyor installations.

16. Conveyor contractors located in Board Area #1 assign work on monorail conveyor installations without regard to the Conveyor Agreement. Ironworkers' counsel contends that the lack of adherence to the Conveyor Agreement is because the document is incapable of reasonable interpretation and, therefore, cannot be applied to the installation of monorail conveyors and package conveyors without giving rise to consistent disputes between the two trade unions over the assignment of conveyor work. The Board disagrees. The evidence before the Board does not support that conclusion. It does support, however, the conclusion that the Conveyor Agreement is susceptible to a variety of interpretations on the same work and, therefore, the potential exists for frequent disputes between the Millwrights and Ironworkers over its application to particular installations. That potential was demonstrated by the cross-examination of Allen by Ironworkers' counsel about how he had applied the Conveyor Agreement to arrive at an assignment of the work in dispute to a crew composed entirely of members of Millwrights Local 1244. Another example was provided by the testimony of a senior executive of the largest conveyor contractor in Canada. It performs all of its conveyor installations in Canada, except in the Province of Quebec. He testified that he could rationalize the Conveyor Agreement so as to require an equal number of millwrights and ironworkers to perform typical conveyor installations which his company performs depending on how he assigned the support steel.

17. Counsel for the Ironworkers submits also that Section 1.7 of Article 1 of the Ironworkers Agreement, which deals with Recognition and Scope, has the effect of superseding the Conveyor Agreement. The Board has examined the article and counsel's argument and finds no merit in the argument.

18. There is also a local agreement between the two trade unions. The predecessor local to Millwrights Local 1244 and Ironworkers Local 700 executed a Memorandum of Agreement on April 2, 1965 dealing with conveyor work ("the Local Conveyor Agreement"). That agreement states that it applies within the geographic jurisdiction of each local, which includes Board Area #1, and purports to recognize the application of the Conveyor Agreement to conveyor installations in newly constructed plants, or additions to existing plants and the application of a crew of equal numbers of millwrights and ironworkers on any erection, dismantling, alteration, or relocation of conveyors in any existing plant. The evidence before the Board is conclusive that the Local Conveyor Agreement has never been implemented and there is no evidence that either trade has relied on it to assert jurisdiction over conveyor work. Accordingly, the Board will give no weight to the Local Conveyor Agreement with respect to this criterion.

19. With respect to the Conveyor Agreement, whether or not other contractors have relied on it and whether or not Acco has given it a reasonable interpretation when assigning work on monorail and package conveyors, the Board is satisfied that Acco has relied on the Conveyor Agreement for assignment of the work in dispute and other monorail and package conveyor work on its projects in Board Area #1 and elsewhere in Ontario. In these circumstances, this criterion favours the assignment of the work in dispute to members of Millwrights Local 1244.



### Skills, Training and Safety

20. Most witnesses who have worked with the tools of either trade, whether or not they were currently working in either trade, acquired their skills in conveyor work by means of on-the-job training and, to a very large extent, by working on mixed crews of Millwrights and Ironworkers. On these mixed crews they performed not only the work traditionally claimed by their trade, but also the work traditionally claimed by the other trade. Currently, the apprenticeship programmes of both trades include classroom instruction and job-site training in the skills and work functions required to perform all aspects of monorail and package conveyor work. Both trades, Acco and other employers acknowledge that millwrights and ironworkers are equally competent to perform monorail and package conveyor work and to perform it safely. The factor of skills, training and safety does not favour assignment of the work in dispute to either Millwrights Local 1244 or Ironworkers Local 700.

### Efficiency and Economy in the Performance of the Work

21. There is no evidence which suggests that the assignment of the work in dispute to either members of Millwrights Local 1244 or Ironworkers Local 700 would affect the economy and efficiency of the performance of the work in dispute. Accordingly, this criterion is neutral insofar as determining the assignment of the work in dispute to either trade.

### Employer Past Practice

22. Acco is a major conveyor contractor in Ontario. For the past ten years up to and including the assignment of the work in dispute, it has been Allen's practice on behalf of Acco to assign the installation of monorail and package conveyors in accordance with his interpretation of the Conveyor Agreement, except in Metropolitan Toronto and its immediate environs. In that area, Acco assigned conveyor installations in plants owned by General Motors, Ford and Chrysler in accordance with his understanding of an agreement between the two unions that the work be performed by a crew made up of equal numbers of each of those trades. Whenever Acco employed both trades on conveyor installations, once the crew ratio was established, it used the trades interchangeably without any separation of work functions by trade. The jobs which Acco performed during those ten years included jobs in Board Area #1. Except for one job of approximately seven weeks duration, most of the jobs in Board Area #1 were of very short duration and employed only a few tradesmen, frequently all millwrights. They were also performed without Acco notifying Ironworkers Local 700 that it had a job in Board Area #1, in spite of the following provision in section 2.5 of the Ironworkers Agreement:

"An Employer will notify the Local Union as soon as possible, but no later than twenty-four (24) hours prior to any job starting, and will advise the approximate number of Local Union members required."

The Board takes no position on whether that provision required Acco to notify Ironworkers Local 700 of the jobs in Board Area #1. It is simply a matter of fact that Acco did not give notice of those jobs and, except possibly for the one job of seven weeks duration, Ironworkers Local 700 would not likely have become aware of the jobs even with reasonable diligence.

23. Acco is the successor employer to Canadian Mechanical Handling Systems Ltd. through a series of corporate restructurings. Canadian Mechanical Handling was based in Windsor during the 1950's and until the beginning of the 1970's when it moved to Oakville. It moved to Burlington in the mid 1970's and shortly after that became Acco. After its move out of Windsor, Canadian Mechanical Handling continued to perform conveyor installations in Windsor. The evidence estab-

lishes to the Board's satisfaction that, during most of the 1970's, Canadian Mechanical Handling performed a substantial number of monorail and package conveyor installations in Board Area #1 using a balanced composite crew. Neither Millwrights Local 1244 (including its predecessor) nor Ironworkers Local 700 raised formal grievances or work assignment complaints with respect to the performance of that work. Therefore, insofar as Board Area #1 is concerned, Acco has changed from a practice of assigning monorail conveyor and package conveyor work to a balanced composite crew to assigning it in accordance with the Conveyor Agreement. However that does not alter the fact that, during the ten years preceding this complaint, Acco followed a practice in Board Area #1 of assigning work on monorail conveyors and package conveyors in accordance with the Conveyor Agreement and not to a balanced composite crew. Accordingly, the criterion of employer past practice favours maintaining Acco's assignment of the work in dispute.

#### Employer Preference

24. It is Acco's preference to assign monorail and package conveyor work in accordance with the Conveyor Agreement, as Acco interprets it, because that practice allows it to cost and bid jobs in any area of Ontario without having to determine whether there is any contrary local area practice. Allen testified that Acco has had no difficulty during the past ten years in applying the Conveyor Agreement and that its application on many jobs has led to Acco being a substantial employer of the Millwright trade. The Maidstone job for Magna is the only job in those ten years on which Acco has experienced any problem over its assignment of conveyor work. Allen argues for Acco that, because a contractor needs to know with certainty what trades it will be using when it comes to perform a job, work assignments properly made in accordance with trade agreements between international trade unions should not be disturbed to comply with some other local practice. Counsel for the Millwrights argues that if Acco is satisfied that it is economic and efficient to assign the work in dispute in accordance with the Conveyor Agreement, then it should be allowed to do so and its assignment should be undisturbed. Counsel argues that it is not up to the Board or any other party to tell the employer what is economic or efficient for its business and if economy and efficiency is the basis for its preference, it is sufficient to justify the employer's preference. Counsel for the ironworkers argues that there is no cogent, rational basis for the employer's preference because there is no distinction in the trade competence of the millwrights and ironworkers and Allen would have gone along with any agreement which Millwrights Local 1244 and Ironworkers Local 700 made with respect to the manning of the Maidstone project.

25. As the Board has already noted, there is neither an economy and efficiency advantage nor a trade skill advantage in using one trade or the other. The main rationale for the employer's preference to assign the work in dispute on the basis of the Conveyor Agreement is for reasons of certainty in knowing how to cost and bid jobs. On that basis, the Board is satisfied that the criterion of employer preference slightly favours assignment of the work in dispute to members of Millwrights Local 1244.

#### Area Past Practice

26. Area past practice with respect to this complaint is the practice of employers other than Acco in assigning monorail conveyor and package conveyor work on projects within Board Area #1. It was predominantly in the form of *viva voce* evidence, supported from time to time by documentary evidence respecting particular aspects of witnesses' testimony. There was a large volume of anecdotal evidence about the jobs performed by a substantial number of contractors. However, the empirical evidence about the size of the jobs was limited largely to crew size and man-hours worked. Crew sizes were seldom consistent except on jobs of short duration. Therefore, on the larger jobs, the crew size evidence tended to reflect the maximum size reached during the project.



27. The jobs about which the Millwrights adduced evidence were small-package conveyors, except for one large-package conveyor job and two monorail conveyor jobs. The two monorail jobs were of very short duration, small crew size and were performed by crews made up of members of Millwrights Local 1244. Approximately half of the small-package conveyor jobs on the Millwrights' job list involved what Millwrights' counsel called blue steel conveyors and Ironworkers' counsel called automated mechanical handling systems. Semantics aside, all of the "blue steel" jobs in evidence were installed in automobile industry plants in Windsor.

28. One of the largest jobs on the Millwrights' list was a blue steel job at the General Motors transmission plant. The job was performed in 1981 by E.S. Fox Ltd., a large, multi-trade contractor from outside of Board Area #1. The job took nearly a year to complete. Stu Reddick, who ran the job for Fox, described it as an automated material handling system supplying small parts to automated work stations along the transmission assembly line. There was no monorail conveyor in the system. The parts are moved from station to station along steel chuting. The term "blue steel" comes from the type of high tensile steel from which the chuting is made. Reddick testified that there was approximately two hundred feet of chuting in the entire system, some of which was plain and some of which had ball rollers mounted to the inside, bottom surface over which the parts traveled by gravity. Elevating devices were used, where needed, to raise the load to a height which enabled it to be fed into a chute to take it to the next work station. Diverters or gates were installed in the chutes where needed to change the direction of travel. The chuting and diverters were the conveyor part of the system, according to Reddick, and required approximately two percent of the total man-hours needed to install the system. That part of the job was assigned to and performed by members of Millwrights Local 1244.

29. The Conveyor Agreement makes no reference to either blue steel systems or blue steel chuting. Reddick considered it to be like a small-package conveyor and assigned the work in accordance with that section of the Conveyor Agreement. He testified also that he was guided by that Agreement in assigning some work exclusively to members of Ironworkers Local 700; that is, the installation of header steel where it was needed for the support of chuting sections and the unloading, handling and transportation to a holding area of the equipment for the system. The movement of equipment from holding areas to the point of installation was assigned to a crew of equal numbers of members of Millwrights Local 1244 and Ironworkers Local 700. Reddick assigned it that way because that is what he did on jobs in another Board area, not because of the Conveyor Agreement. (The Board notes that it is arguable that at least part of the work assigned exclusively to Ironworkers and to the mixed crew should have been differently assigned under the Conveyor Agreement).

30. During 1980 and 1981, other contractors on the Millwrights job list were also performing blue steel jobs in Windsor automotive plants. Essex Machine Installation Co. and Commercial Contracting Corporation of Canada, both located in Windsor, had blue steel jobs in General Motors transmission plant. Both assigned the work to Millwrights. Essex met with representatives of Millwrights Local 1244 and Ironworkers Local 700 before the job and later made a written assignment of the work to members of Millwrights Local 1244. There is evidence that Commercial experienced substantial disruption of its job because of its assignment to members of Millwrights Local 1244. Commercial also performed a large blue steel job at a Ford Motors plant in Windsor in 1981. It employed approximately 100 members of Millwrights Local 1244 and 10 of Ironworkers Local 700. The Ironworkers did not file a grievance or work assignment complaint.

31. It was the Ironworkers past practice evidence which dealt with jobs performed some 30 to 35 years prior to this complaint. The Board has noted already that, not surprisingly, that evidence lacked the specificity to make it useful, except to give an historical perspective to the area



past practice evidence. The Board will return to that aspect of the evidence later. For the purpose of examining how employers have assigned work on monorail conveyors and package conveyors installations in Board Area #1, the Board has considered only those jobs about which the Board was satisfied that witnesses had direct knowledge of the jobs and demonstrated a reliable, unassisted recall of how work on the jobs had been performed and assigned.

32. Evidence about monorail conveyor systems and power and free conveyor systems predominated amongst the jobs about which the Ironworkers adduced evidence of area past practice. As with the blue steel chuting, the Conveyor Agreement does not refer to power and free conveyor systems. Some witnesses differed as to whether power and free conveyors were monorail conveyors because they employ more than one rail. The second rail makes it possible for loads being transported on the system to be taken out of the system and stored, or to be taken out of the system and later re-introduced to it without stopping the entire conveyor, as is the case with the true monorail. Otherwise the power and free conveyor system has a powered I-beam rail like a monorail system and uses similar equipment components, such as drive-chain, power drives, power take-ups and carriers. The Board is satisfied from all of the evidence that power and free conveyors are, as one witness described them, more like monorail conveyors than like any other system described in the Conveyor Agreement. Therefore, for the purpose of assessing area past practice evidence in this complaint, the Board will include the evidence respecting power and free conveyor systems and when the Board refers generally to monorail conveyors, the reference will be inclusive of power and free conveyors.

33. Much of the Ironworkers' evidence, but by no means all of it, was about jobs performed by C. H. McInnis Company Limited, R. J. Cyr Company Incorporated and Jervis B. Webb Company of Canada, Ltd. McInnis and Cyr are the two largest conveyor fabricators and installers based in Windsor. Webb is based outside of Board Area #1 and is the largest conveyor contractor in Ontario and Canada. Jobs performed by these contractors included the largest ones in evidence in terms of man-hours worked and cumulatively represented by far the greatest volume of conveyor work in evidence. One of Webb's jobs alone involved more man-hours than all of the jobs for which man-hours evidence was available on Acco's and the Millwrights job lists. McInnis, Cyr and Webb consistently assigned the work on their jobs to a balanced composite crew. Many of these assignments were made after a pre-job mark-up meeting which included both trade unions. Webb always held pre-job, mark-up meetings and usually obtained agreement from both unions. In at least one major job, even though Millwrights Local 1244 disagreed with Webb's proposed assignment to a balanced composite crew, Webb was not challenged either by a grievance or a work assignment complaint when it carried through with the assignment. Olsen will accept an agreement of the business agents of the two unions to divide the work between the trades, but most of the time there is no agreement and the work is assigned to a balanced composite crew. The evidence about other jobs on the Ironworkers job list establishes that other contractors, whether based inside or outside of Board Area #1 assigned monorail and package conveyor installations to a balanced composite crew.

34. The anecdotal evidence is consistent with such a practice getting its start in the early 1950's and being followed on conveyor installations during the mid-1950's into the beginning of the 1970's. That is not to say that the practice ended or altered at that point, just that the area past practice evidence before the Board about jobs performed from that point in time until the making of this complaint is more specific about the assignment of monorail and package conveyor work. The evidence of Arthur Brunelle, Ray Cyr and James Harrower supports the conclusion that the genesis of the practice was when the Boilermakers union relinquished its claim to jurisdiction over the field installation of conveyor systems, particularly respecting employees of McInnis. Their evidence does not pin-point when that happened but places it between 1952 and 1955, a period which

brackets the emergence of the Conveyor Agreement. Harrower was a member of Ironworkers Local 700 at the time and working in the trade in Windsor. Later, he became a business agent for the union. Brunelle and Cyr were employees of McInnis at the time. McInnis employees who were performing its conveyor installation work at the time, joined one or the other of the two unions, approximately the same number going into each. After that, McInnis used them and other members of the two unions to perform its conveyor installation work. William Olsen of Webb testified that Webb was performing conveyor installation in the Windsor area with a balanced composite crew in 1954 when he became responsible for that work. He stated that the practice had been started by his predecessor. The evidence does not tell us whether that was as a result of an already existing practice or merely coincident with it. Cyr left McInnis in 1958 to establish his own company, R. J. Cyr Company Incorporated. Most of the conveyor systems which R. J. Cyr has installed since then have been monorail systems. Cyr immediately adopted the practice of assigning that work on R. J. Cyr's projects to a balanced composite crew and was still following the practice at the time of this complaint.

35. The evidence establishes that these employers and others who assign monorail conveyors and package conveyor work to a balanced composite crew, seek to maintain the 50/50 ratio on a job by job basis, but several witnesses admitted that factors like daily absenteeism and the inability of one of the unions to supply members when they are called for will cause a job crew to be out of balance from time to time. Therefore they tried by such means as making sure that the man-hours over the life of the job, or over all jobs done in a particular time period, were evenly divided between the trades. While these employers may not have been able to consistently maintain a balanced composite crew on a job by job basis, the evidence was consistent and clear that, if the job steward of either trade believed that the employer was not fairly maintaining a balanced composite crew, any actual imbalance was quickly corrected or justified.

36. Counsel for the Millwrights argues that Webb assigns conveyor work in Board Area #1 to a balanced composite crew not because it recognizes a local practice, but because it is importing into Board Area #1 its own practice which it follows everywhere in Canada that it installs conveyors, except the Province of Quebec. The Board disagrees. It is just as reasonable to conclude from the fact that Webb was using balanced composite crews on conveyor jobs in Board Area in 1954, that Webb was an active player in the development of the practice in Board Area #1. Counsel argues also that it is not the practice of R. J. Cyr and McInnis to ensure that they maintain a balanced composite crew on each conveyor job which they perform, rather they maintain an overall employment level of equal numbers of each trade. In addition, they perform work outside of Board Area #1 and their work is not restricted to conveyor work. Therefore their practice cannot be construed as a Board Area #1 practice of assigning monorail and package conveyors to a balanced composite crew of millwrights and ironworkers. Again, with respect, the Board must disagree. The evidence respecting McInnis and R. J. Cyr is clear and overwhelming that they consistently assign work on monorail and package conveyor systems to a balanced composite crew. To the extent that, when factors not in their control may temporarily upset the crew balance, they may seek to balance the total hours worked over the life of the job or to maintain an overall employment level of the two trades, the Board views that as demonstrating their commitment to maintaining the assignment to a balanced crew in these circumstances.

37. As the Board has noted earlier, it decided at the outset of this case to admit evidence of area past practice respecting two types of conveyor systems, monorail and package, in order to have evidence of a sufficient variety of conveyors which might arguably be included in the term "monorail conveyor" by which the work in dispute is described. There is no evidence, and no argument was made, which establishes any similarity between the two systems or that any of the types of package conveyors in evidence could be construed as monorail conveyors. Therefore, since the



work in dispute is "... all work in connection with the installation of a monorail system ...", the Board, in assessing the criterion of area past practice, will give weight only to the evidence respecting monorail conveyor systems. That evidence overwhelmingly leads to the conclusion that the criterion of area past practice does not favour assignment of the work in dispute exclusively to members of either Millwrights Local 1244 or Ironworkers Local 700. Instead, it very strongly favours assignment to a crew composed of equal numbers of members of Millwrights Local 1244 and Ironworkers Local 700 without limitation of the work functions to be performed by members of either trade. There are several, sound reasons why that is so.

38. Compared with assigning various work functions exclusively to one trade or other, as the Conveyor Agreement does, the use of a balanced composite crew on monorail conveyor installations makes for a more economic and efficient installation. This was the conclusion expressed by a significant number of witnesses who identified the following factors which contribute to that result. The balanced composite crew eliminates the need for separate crews of each trade and the separation of the work functions of the trades. For example, millwrights install the "red iron" support steel which otherwise would be the work of ironworkers and ironworkers install power drives and power take up which would otherwise be the work of millwrights. In addition where their traditional work jurisdictions overlap, it eliminates the inter-trade squabbles which, even if they do not develop into formal complaints or in to other disruptive actions, disturb the job and detract from "getting the job done". It eliminates waste time, which would result from using separate crews while one crew waits for the other to complete some work function or functions which must be done before the waiting crews can do its work, or from having to lay off members of one trade until work is ready for them and then having to re-assemble that trade crew. Each time members of a trade are laid off, there is a risk that the employer will not get the same persons back. Each time that happens, the new employee has to be made familiar with the particular job even though, as a tradesman the union has all of the requisite skills to perform the work. That happens all of the time with the normal turnover on construction sites, there is no need to add to the problems. By contrast, the balanced composite crew and elimination of separate crew down time enhances continuity of employment.

39. Many of these same witnesses, from their experience with balanced composite crews, also acknowledge several other benefits. Both Millwrights Local 1244 and Ironworkers Local 700 have developed a membership experienced in all aspects of monorail conveyor work with the capability of performing interchangeably all work functions. This is acknowledged, in particular, by the representatives of both unions as well as individual members who testified, and by the representatives of the contractors, including Acco. At least one witness commented that he sometimes forgets what his home trade is. Through the on-the-job training opportunities from performing all work functions inter-changeably on monorail conveyor installations, the members of both unions gain a level of trade competency proficiency and versatility which, in turn, improves their chances for continuity of employment in the trades.

40. It is significant that, where monorail conveyor work was assigned to a balanced composite crew, the great majority of those assignments were made after a pre-job mark-up meeting with the trades to discuss the contractor's in landed consignment. Labour disputes seldom occurred on those jobs. It is significant also that, when disputes arose because monorail conveyor work had not been assigned to a balanced composite crew, the disputes were resolved by making that assignment.

41. Millwright's counsel argues that all of the benefits claimed for a balanced composite crew are available without need of a fixed ratio of any kind, let alone a 50/50 ratio. The key to those efficiencies and benefits, he submits, is in the willingness of the members of the two trades



and the representatives of their unions to cooperate. He pointed, for example, to Acco which applies the Conveyor Agreement in making conveyor assignments. Where that results in both millwrights and ironworkers working on the job, once the ratio has been established Acco has no difficulty in using the members of the two trades to perform the work interchangeably without separation of work functions. Furthermore, counsel argues, were the Board to impose a balanced composite crew assignment, it would be necessary to deal with the difficult question of how Acco, and other contractors who would be caught by similar assignments, would have to achieve the 50/50 ratio. Would it have to be achieved on a daily basis or arranged over some larger period and, either way, what will the contractors be required to do to ensure the maintenance of the ratio and how will the two unions know that the contractor is employing equal number from each trade on its conveyor work?

42. Allen, for Acco, concurred with those submissions.

43. With respect, the evidence points in a different direction, although the Board agrees with counsel that the real dispute here is over the ratio of members of Millwrights Local 1244 to members of Ironworkers Local 700 to be employed on conveyor work, and not whether they will work in a mixed crew. Nor is it contended that the work in dispute is so inherently identified with one trade that it is entitled to an exclusive assignment of the work. Having said that, it is clear that cooperation exists willingly when members of the two trade unions are satisfied that they are sharing the work opportunities equally and that problems develop primarily when a contractor's assignment departs from the 50/50 ratio. On the evidence, the unions do not have a problem monitoring the ratio. It was brought out time and time again by witnesses that the unions' job stewards were quick to tell a contractor if they thought a crew was not balanced and generally were successful in resolving real and perceived imbalances. There is nothing in the evidence which suggests that will change.

44. For all of these reasons, the Board finds that the criterion of area past practice very strongly favours assignment of the work in dispute to a balanced composite crew.

#### Conclusion and Assignment

45. This is not a typical work jurisdiction complaint in the sense that it is not a competition between two trade unions for an exclusive assignment of work in dispute. The Millwrights seek such an assignment but the Ironworkers seek an assignment to their members as part of a crew made up of equal numbers of members of both unions. It is not a matter of the Ironworkers trying to piggy-back on the Millwrights for a piece of the action on conveyor installations in Board Area #1. There is a long history of the Ironworkers performing monorail and package conveyor work in that area on a composite crew basis and their claim that monorail conveyor work should be assigned to a balanced composite crew is well founded by the overwhelming evidence of a pervasive area past practice to that effect. As the Board observed in *Simcoe Mechanical Contracting Limited*, [1982] OLRB Rep. Sept. 1352, at paragraph 30:

"... In some instances, the area practice alone has been sufficient to establish the claim of one trade union over the claim of another trade union. See for example, *Ilena Construction Company Limited*, *supra*. However, in *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185, the fact that area practice favoured one trade union was not sufficient to cause the Board to award the work in dispute to that trade union."

In the instant case, having examined the criteria and regardless of the fact that three of the four criteria which are not neutral point to an assignment of the work in dispute to members of Millwrights Local 1244, for reasons which follow, the Board is convinced by the evidence viewed as a whole, and particularly the evidence surrounding the development of the area past practice itself, is suffi-

cient to establish the Ironworkers' claim that the work in dispute should be assigned to a crew composed of equal numbers of members of Millwrights Local 1244 and Ironworkers Local 700 without limiting the work functions to the performed by members of either trade.

46. As between the choice of assigning the work in dispute exclusively to one trade or the other, the Board has found that three criteria point to an assignment to members of Millwrights Local 1244. They are work jurisdiction arrangements between the two unions, employer past practice and employer preference.

47. With respect to the criterion of jurisdictional arrangements between the unions, the Board concluded that it favoured an assignment to members of Millwrights Local 1244, not because the Conveyor Agreement had been relied on generally by contractors and the two unions for assigning monorail and package conveyor work, but because "... Acco has relied on the Conveyor Agreement for the assignment of the work in dispute and other monorail and package conveyor work on its projects in Board Area #1 and elsewhere in Ontario". However, in Board Area #1, the practice of assigning monorail conveyor work to a balanced composite crew is so long standing and pervasive that it clearly has superseded the Conveyor Agreement. Therefore, in the particular circumstances of this complaint, the Board will give little weight to the criterion of jurisdictional arrangements between the unions.

48. By giving little weight to the Conveyor Agreement, this Board panel is not disagreeing with the Board's jurisprudence which finds that formal arrangements between trade unions, like the Conveyor Agreement, are quite persuasive provided that, following their making, assignment of the work which they purport to govern is generally consistent with such arrangements. Nor does the Board's conclusion diminish the usefulness of such arrangements as a criterion in resolving work assignment disputes. They are useful evidence of recognition, by trade union parties to the arrangement, of each trade union party's work jurisdiction. The Board recognized their usefulness in *Ilena Construction Company Ltd.*, [1974] OLRB Rep. Nov. 775, at paragraph 26, and then observed that:

"... As criteria in a work assignment dispute, the more formal the arrangement, the more weight is given to the particular arrangement, simply because such documents frequently take years of negotiations between the trades involved before they are endorsed."

It makes sense that contractors like Acco should be able to rely on that evidence of one trade union's recognition of another work jurisdiction in deciding how it will perform work covered by such an agreement. This is particularly so with the present day mobility of contractors and building tradesmen in the construction industry in Ontario. Indeed, even though contractors are not parties to such trade agreements, and even though trade agreements by themselves may not be dispositive of a dispute, where the trade union parties have mutually followed the agreement in asserting their jurisdiction over the covered work, it makes labour relations sense to expect contractors who have collective bargaining relations with those unions to assign that work in accordance with such agreement or to satisfy the parties and/or a jurisdictional disputes tribunal by convincing evidence that there were substantial reasons for a contrary assignment. It also makes labour relations sense that trade unions bound by such agreements be expected to demonstrate substantial grounds, like a pervasive past practice, to justify pursuing contrary assignments or otherwise disregarding the agreements. On the other hand, when trade unions bound to trade agreements on jurisdiction are prepared to agree with a contractor that, in particular circumstances, the work should be assigned on a different basis, they should be able to do so without being confronted later with a claim that the arrangement was a precedential departure from the trade agreement.

49. The pervasive area past practice here, however, excepts the instant case from those



expectations. The Conveyor Agreement is not one where the trade union parties have asserted it with any consistency, if at all in the case of Ironworkers, in Board Area #1. Rather, the evidence is that it has largely been ignored respecting monorail conveyor work in Board Area #1. The evidence of it being relied on by contractors and the Millwrights is limited to, for example: a contractor who unlike Acco, had bargaining relationships only with the Millwrights; the blue steel systems jobs and a few package conveyor jobs on the Millwrights' job list. The package conveyor jobs were mostly small and of short duration and had been assigned to the Millwrights without the knowledge of or notice to the Ironworkers. In fact, Mathews Conveyor Company, one of the contractors on the Millwrights' job list, which relied on the Conveyor Agreement to assign a few short-duration jobs involving small package conveyors, performed the biggest of its jobs on the list with a balanced composite crew. This was a large-package conveyor installation at H. J. Heinz in Leamington. The job lasted nine months and Mathews assigned the work to a balanced composite crew after a mark-up meeting with the trades.

50. Employer past practice does favour Acco's original assignment, which was exclusively to members of Millwrights Local 1244.

51. With respect to employer preference, the Board found that it favoured slightly assignment of the work in dispute to members of Millwrights Local 1244 because Acco had based its preference on being able to rely on the Conveyor Agreement for purposes of certainty in knowing how to cost and bid jobs. While the Board agrees that a contractor should be able to rely on such an agreement where the trade union parties to it have relied on it with reasonable consistency in asserting their claims to work jurisdiction, the Board has found herein that the Conveyor Agreement has been superseded in Board Area #1 by the persuasive area past practice respecting the assignment of monorail conveyor work. Therefore this criterion becomes a neutral factor.

52. Finally, the criterion of efficiency and economy in performing the work in dispute was considered to be a neutral factor. But that was respecting whether the work in dispute should be assigned exclusively to one trade or the other. For purpose of deciding whether the proper assignment should be exclusively to members of Millwrights Local 1244 or to a balanced composite crew, it is appropriate to consider the economy and efficiency benefits of the balanced composite crew attested to by a significant member of witnesses, as discussed above. That consideration favour assignment to a balanced composite crew.

53. Having regard to the foregoing, the Board concludes that the work in dispute was improperly assigned. Therefore, pursuant to the provisions of section 93 [formerly section 91] of the *Labour Relations Act*, the Board directs that:

Acco Canadian Material Handling, a Division of Babcock Industries Canada Inc. shall assign to a crew composed of equal numbers of members of Local 1244 of the Millwrights District Council of Ontario and of the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, without limiting the work functions to be performed by members of either trade, all work in connection with the installation of a monorail conveyor system known as a monoveyor at the newly constructed Magna plant in Maidstone, Ontario.

54. Counsel for the Ironworkers requested that such a direction be made with respect to the Board's geographic area #1. The Board is not unmindful, on the one hand, of the substantial investment of time and effort of the parties which went into litigating this dispute. On the other hand, even though there was evidence of existing and developing tensions over the performance of conveyor work in Board Area #1, the Board did not have before it any evidence that it has previously had to decide in Board Area #1, assignments of the type of work which was in dispute here. Therefore the Board is not prepared to expand the assignment beyond the job in dispute.

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**1350-91-R; 1354-91-U** Retail, Wholesale and Department store Union, AFL:CIO:-CLC:., Applicant v. Wentworth Beaver Limited c.o.b. **Beaver Lumber**, Respondent; Retail, Wholesale and Department store Union, AFL:CIO:CLC:., Complainant v. Wentworth Beaver Limited c.o.b. **Beaver Lumber**, Respondent

**Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Unfair Labour Practice - Remedies - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the Act**

**BEFORE:** *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

**APPEARANCES:** *Mary Hart* and *Robert McKay* for the applicant; *Fred Heerema* and *R. G. Richter* for the respondent.

**DECISION OF VICE-CHAIR M. A. NAIRN AND BOARD MEMBER D. A. PATTERSON;** May 13, 1992

1. Board File No. 1350-91-R is an application for certification. Board File No. 1354-91-U is a section 91 [formerly section 89] complaint, alleging that the respondent has violated sections 3, 65, 67, and 71 [formerly sections 3, 64, 66, and 70] of the *Labour Relations Act* (the "Act"). The complainant ("trade union" or "applicant"), in addition to other remedies, seeks relief in its application for certification pursuant to section 8 of the Act.

2. By decision dated August 26, 1991 the Board (differently constituted) set out its finding with respect to the description of the appropriate bargaining unit, and outlined the parties' then disputes concerning the list of employees. Before this panel, the parties were agreed that Cheryl Woodward, classified as cash area bookkeeper was properly excluded from the bargaining unit and that challenge was thereby resolved. By decision dated December 13, 1991, this panel concluded that William Daiglesh did not exercise managerial functions in accordance with section 1(3)(b) of the Act and was therefore properly included in the bargaining unit. At the outset of its submissions the applicant withdrew its challenge to Cory Smith. The parties were therefore agreed that Cory Smith should not appear on the list of employees of the respondent on the application date. With respect to the list of employees, that left for determination the status of five challenged persons, all of whom were grievors in the section 91 complaint. This panel convened to hear the evidence and submissions of the parties on the outstanding issues involving the application for certification and the section 91 complaint, including the applicant's request for relief pursuant to section 8 of the Act. Those matters were heard over seven days of hearing. We do not intend to refer in this decision to all of the evidence but will summarize those matters relevant to our conclusions.

3. The respondent owned and operated five retail lumber (including hardware and housewares) stores. Three are situated in Hamilton (the "Parkdale", "Fennell", and "Main St. W." stores); one in Burlington (the "Fairview" store); and one in St. Catharines (the "St. Catharines" store). It also operated a distribution centre adjacent to the Parkdale store which provided a warehousing and distribution service to all the stores. This application for certification is for those employees of the respondent employed at the Parkdale store in Hamilton. The employees in the bargaining unit applied for are engaged in various functions including sales, cash, warehousing (including the "drive-thru"), cart collecting, stocking, etc. While the respondent employs persons in these job categories on both a full-time and a part-time basis, the bargaining unit consists of only

full-time employees. Including the remaining challenges, there were thirty-three employees in the bargaining unit on the application date.

4. The allegations raised in the section 91 complaint concern primarily the termination from employment in early July, 1991 of five individuals who were employed on the night crew performing stocking functions at the Parkdale store. The applicant makes further allegations with respect to certain conduct of the night crew supervisor, the assistant store manager, and the respondent's Vice-President and General Manager. The respondent denies the allegations of improper conduct and asserts that the termination of the five individuals from employment was motivated solely for legitimate business reasons.

5. Prior to 1991 the Fennel store had employees stock the store on a night shift. This store enjoyed the largest sales volume of the five but suffered from the smallest amount of available space. Employing a night crew to perform stocking functions did not disrupt customer service during the day while the store was open for business. That measure was implemented, proved successful and was, in the latter part of 1990, considered for implementation in the other stores. The key objective in implementing the night crew was to remove stocking functions from individuals normally involved in customer service, and of course, to ensure that product was readily available to customers. The respondent was of the view that a by-product of better customer service would be increased sales.

6. The respondent's busiest season is between April and August of each year. In anticipation of that, a night crew was instituted at the Parkdale store in early January 1991. Similar night crews were also initiated in the other stores following the example of Fennell. Although discussed at regular management meetings involving store managers and senior management personnel, the decision to implement the night crews was made by Mr. Ken Reid, the Vice-President and General Manager of the respondent.

7. Filling the new positions was left to each store manager. At the Parkdale store, Mr. Enzo Bonitatibus, the store manager, offered these full-time positions to four employees who were then working part-time performing stocking functions. In addition, Mr. Sean Stewart, employed as a full-time cart boy, was offered a position on the full-time night crew, which he accepted. Although there were some adjustments to the staffing over the spring of 1991, both with respect to the supervisory personnel and the crew itself (for example the temporary supervisory presence of Jeremy Parasiuk, the arrival of Brad Daiglesh as supervisor of the night crew and the transfer of Shawn Perry to the distribution centre), as of early July 1991 there were six individuals employed on a full-time basis on the night crew at Parkdale. This included Mr. Daiglesh.

8. The night crew appeared to function as anticipated. However on a review of the results of the first quarter sales, Mr. Reid became increasingly concerned about the financial position of the stores. Sales volumes were down, reflecting the generally troubled economic climate. Mr. Reid felt that the respondent should reduce expenditures. He testified that in April there was specific discussion in management meetings of the possibility of eliminating night crews in that this was an expenditure that had not been incurred previously. It was his evidence that the store managers were opposed to this idea and felt there had not been enough time to properly assess the benefit of having night crews. He testified that following these discussions, although he felt that enough time had been given to assess the benefit of the night crews and he felt that they represented an additional cost, he was persuaded to continue the night crews at that point and look for other ways to control costs. Mr. Bonitatibus subsequently testified that he had attended management meetings throughout this period and that no discussion had occurred in April with respect to the possible



elimination of night crews. It was his evidence that these views were not expressed until at least mid-June, 1991.

9. Effective April 1, 1991 the respondent did announce an increase to the employees' work week from forty hours to forty-four hours per week with no increase in pay. In the alternative, employees could opt for the current work week and take a ten percent reduction in pay. In addition, the respondent enacted a wage freeze for employees who had reached their twelve month rate. That freeze was to remain in effect until December 31, 1991 at which time it was to be reviewed. This approach to the respondent's economic concerns was summarized in a memo to all staff in April, 1991 which closed by saying:

Our overall philosophy includes the security and well being of all employees, but this cannot be accomplished without ensuring the security and well being of the Company. These current policy issues address, in the best manner for all, our attempts to minimize cost and maximize service for our customers and to continue our policy of job security for all employees.

That memo was posted over the signature of Mr. Reid. He then attended at each of the five stores during the week of April 15 - 19, 1991 to answer any questions that employees had regarding the extended work week. According to Mr. Reid, by increasing full-time employee hours the respondent could avoid hiring part-time employees for the busy spring and summer season, thereby saving the respondent money and avoiding the lay-off of full-time employees. This decision received some attention in the local press. In his evidence Mr. Reid agreed that it was his view, as noted in the newspaper reports, that this approach was preferable to the "hard-line approach of slashing jobs" when business slowed down. This increase to the work week was designed as a temporary measure. It was Mr. Reid's intention to review it every three months and to revert to the regular schedule if and when business picked up. That sentiment was confirmed in a memo to all employees dated April 26, 1991.

10. The applicant's organizing campaign commenced in April 1991. Mr. Reid became aware of it in April. He was advised by the store manager at Fennell that an employee had been approached by the trade union. On April 29, 1991, Mr. Reid met with Mr. Richter, the respondent's Vice-President of Human Resources. They discussed the fact of the organizing campaign. Mr. Richter provided Mr. Reid with a copy of a letter for distribution to employees. However Mr. Reid decided not to distribute the letter at that time because he felt that the organizing activity did not warrant it.

11. The union held its first meeting on June 4, 1991. Mr. Reid was also aware of this meeting and that employees had been invited to it. One employee spoke to him in the store and another requested an appointment with him in his office. Although the evidence is not entirely clear with respect to the timing, it is apparent that a third employee approached the assistant store manager, Lorenzo Sciarra, in early June. The employee advised him that the union was organizing, and that this employee had been approached to join by Sean Stewart, a member of the night crew. Mr. Sciarra testified that he reported this to Mr. Bonitatibus who advised him to report to Mr. Reid, which he did. Mr. Bonitatibus testified that upon receiving this report from Mr. Sciarra he immediately informed Mr. Reid. Mr. Reid acknowledged having received information that the trade union was organizing and that it involved a member of the night crew. While Mr. Sciarra testified that he informed both Mr. Bonitatibus and Mr. Reid of the nature of the conversation that he had with the employee, Mr. Reid denied being informed that any particular individual on the night crew was involved.

12. On June 10, 1991, Mr. Reid issued a memo to all staff advising that as a result of improved sales activity and an anticipation that the company would soon be returning to normal



sales levels, the respondent was discontinuing the extended work week effective June 16, 1991, and thanking the staff for their cooperation. The wage freeze continued in effect. His decision to return to the normal work week was made on the basis of significantly increased sales activity for the period between May 21 to June 4, 1991.

13. On June 11, 1991 a notice was posted to all employees in the Parkdale store. This memo advised that employees had indicated to management that they had been approached concerning organizing a union during working hours, which activity was distracting them from performing their regular work. The memo, which is two paragraphs long, advises:

“Under no circumstances should company premises or time being paid for by the company, be used for canvassing or obtaining support from other employees both for or against organizing a union to provide third party representation”.

14. The applicant has alleged that a memo similar to this was posted which included a threat to terminate those employees involved in organizing on behalf of the trade union on company time. We heard evidence from two of the grievors concerning a third paragraph. Having regard to all of the evidence we are satisfied that the memo filed as Exhibit 7 was posted in that form. Mr. Stewart testified he took the “basic idea” from it. We are satisfied that although the grievors may have interpreted the memo as a threat of termination they read it in the context of a union organizing campaign where employees may be concerned about their job security and it is perhaps not surprising that they did not read the memo as carefully as they might otherwise.

15. During the same time period the respondent distributed a copy of a letter to each employee at the Parkdale store. That letter was filed as Exhibit 8. It was handed to each employee by the store manager or assistant store manager. The letter sets out a number of factors for employees to consider in relation to union representation. It also states the employer’s belief that employees do not need to pay a third party to represent their concerns. The memo concludes by acknowledging that the employees will carefully consider their decision and reminds employees that the decision about union representations is theirs to make. This letter with minor amendments was the same as that provided earlier to Mr. Reid by Mr. Richter. Mr. Reid chose to distribute it at this time because in his view employees were confused and he wanted them to know their rights. It was distributed directly to each employee to ensure that it was received.

16. The night crew at Parkdale had been working predominately a shift running from 9:00 p.m. to 5:30 a.m. In early June, Mr. Reid decided to alter the shift of the Parkdale night crew and move them to afternoons, ending at 11:00 p.m. Mr. Reid testified his intention was to prove that the stores could be stocked while still open for business. He testified that he decided to use the Parkdale night crew as a test because that store is adjacent to his office and therefore he could attend on a daily basis to assess how the store was functioning. In other circumstances Mr. Reid would not have a daily presence in any of the stores. As a result of monitoring the Parkdale store to see if standards were being maintained in June 1991, Mr. Reid concluded that the stores could be stocked during the day and therefore it was not necessary to have night crews. He concluded that the day staff were not contributing to additional sales notwithstanding that their stocking functions had been removed. He therefore instructed the store managers at the end of June to reduce staff.

17. Mr. Reid testified that it was his intention to eliminate twenty-five to thirty full-time positions and to accomplish this by eliminating stock-taking positions at all the stores (with the exception of Fennell but including the distribution centre). This decision was taken by Mr. Reid at the end of June and communicated to his store managers at a regular management meeting. This decision was taken he testified, on the basis of a significantly reduced volume of sales for the three-

week period following June 4, 1991. Mr. Reid testified that the decision as to which employees should actually be let go was left to each store manager and that his intention was to generate a reduction in full-time positions across the chain. It is apparent however that Mr. Reid made it clear to the store managers that it was his view that the night crews should be eliminated. Mr. Bonitatibus testified that in the discussions in the management meeting overall figures were not discussed but that he understood that five full-time positions were to be terminated at the Parkdale store and, for example, four night crew positions at the Main St. W. store. Although Mr. Reid attempted to disassociate himself from any decision with respect to the reduction in jobs at each store, it is apparent that Mr. Bonitatibus understood from Mr. Reid that he preferred that the night crew be eliminated. It was Mr. Reid's advice to the store managers in the "strongest terms" that the reduction in staff was to have the least impact on staff and customer service, therefore, the stocking positions were to be eliminated. Having heard and considered the evidence of each, we have no doubt that Mr. Bonitatibus would have accepted and adopted Mr. Reid's view and implemented it.

18. In early July, 1991, Mr. Simms, Vice-President of Merchandising, informed five members of the night crew at Parkdale that their employment was terminated. The meeting was brief. There was no offer of alternative employment nor any suggestion of future consideration. Four of the grievors were informed shortly after punching in for work on July 5, 1991. They were advised that the decision was taken because of economic considerations and had nothing to do with their performance. A fifth member of the night crew was informed on Monday, July 8, 1991 when he reported for work. By that time, he had already been informed by other members of the crew. He met with Mr. Bonitatibus who repeated Mr. Simms advice. Mr. Daigles's employment was not terminated.

19. Mr. Bonitatibus testified that he did not consider any of the five grievors for alternate employment because, in his view, they were not qualified. He subsequently added that at the time of the terminations no other positions were available. It was Mr. Reid's evidence that the five grievors were not offered other work because no work was available for them at Parkdale. The evidence with respect to the employer's staffing practices can be summarized as follows. The workforce is made up of both a full-time and part-time compliment of employees. The respondent does transfer employees between full-time and part-time employment and vice versa. The respondent also transfers employees between job functions. Although Mr. Bonitatibus attempted to establish skills in the area of customer service as a prerequisite for any consideration of jobs other than stocking, it is apparent that the respondent hires employees who have no prior experience into virtually any classification of employment. While there are no formal job posting provisions, the employer has accommodated employee requests to transfer locations. The respondent does not generally recognize seniority. This was the first occasion of a major reduction of staff in the chain of stores.

20. Mr. Reid was unable to testify to the results of his direction. He did not know whether individuals had been offered part-time or alternate employment or if employees had left the employ of the respondent at other stores. He was aware that an individual on the night crew at the Fairview store was offered another position which she did not want and she consequently resigned. It was Mr. Reid's position that, to the extent a store manager may have preferred a night crew employee to someone else, the option of retaining that employee over another was available to the store manager. Exhibits 9-18 and Exhibit 22 were filed to show that positions had been reduced in accordance with his direction.

21. The grievors' service with the respondent varied from 0.9 to 2.8 years. In Mr. Reid's view the grievors would have been capable of performing other functions including cart boy, stock



clerk, and warehouse and drive-thru functions. According to Mr. Reid the only reason that these individuals were not continued in employment was that no positions were available. He agreed that the respondent hires individuals with no experience for cash and the respondent trains them. He agreed that there was no reason the grievors could not be trained as cashiers.

22. Following the termination of the Parkdale night crew, stocking functions were performed by Mr. Daiglesh on a full-time basis. Mr. Brad Daiglesh was hired according to Exhibit 22 on May 13, 1991 to the night crew. He is listed on Exhibit 23 as 'full-time warehouse'. He was referred to in evidence alternately as manager or supervisor of the night crew. As a result of the certification proceeding, Mr. Daiglesh's status was put in issue. The applicant challenged the inclusion of Mr. Daiglesh on the list of employees asserting he performed managerial functions. The respondent disputed this assertion. A Labour Relations Officer was appointed to inquire into and report to the Board concerning Mr. Daiglesh's duties and responsibilities. Submissions were then received by this panel from the parties and during these proceedings we ruled that Mr. Daiglesh did not exercise managerial functions in accordance with section 1(3)(b) of the Act and he was therefore, properly included on the list of employees. We are satisfied however, that during the relevant time in 1991, Mr. Daiglesh would have been perceived by both the respondent and the employees as a member of management or aligned with management. That conclusion is evident from the testimony given by Mr. Daiglesh both before the Labour Relations Officer and the panel and from the evidence of the assistant store manager.

23. In addition to Mr. Daiglesh, the respondent utilized two part-time employees to perform stocking functions. They had previously worked in the warehouse and drive-thru area and were moved to perform the stocking functions in the week following the termination of the night crew. Although the subsequent movement of employees is not entirely clear, it was Mr. Sciarra's evidence that those part-time positions in the warehouse/drive-thru were filled after moving the two part-timers to stocking functions. Stocking functions were also performed by other employees on the day shift.

24. Mr. Bonitatibus gave no consideration to retaining any of the five grievors. In his view they were not qualified. It was his evidence that every other position at the store involved some element of customer service for which these grievors were not trained. He acknowledged that Mr. Stewart had been working as a full-time cart boy prior to moving to the night crew and as such would have had customer contact. He was of the view that the other grievors had only performed stocking functions. We heard evidence from Mr. Stewart and Mr. Burch concerning the various functions that they had performed over the course of their employment. Mr. Burch's experience included cutting custom orders for lengths of lumber as a result of which he would deal with customers. Although his duties included stocking from his date of hire, he also worked on the lumber crew, had brought goods from the distribution centre to the store, had coded and priced product, and had customer contact in the warehouse and drive-thru area. He outlined the procedure involved for dealing with a customer in that area. He had completed a product knowledge test for the lumber area. He had performed cart person responsibilities as needed, and had worked the lumber sales desk on occasion when it had been busy. Mr. Burch was also licensed to operate the fork lift. Mr. Stewart had been hired as a full-time cart boy and as such would come into contact with customers. He had also performed cleaning and pricing functions. He had filled in in the warehouse and drive-thru area and on occasion had completed straightforward sales at the lumber sales desk. As Mr. Stewart put it, as he "knew more" he was given more responsibility. Mr. Bonitatibus was also aware, following a conversation in the spring of 1991, that Mr. Stewart was interested in transferring off the night crew and had suggested moving back to his job on carts.

25. The respondent asserts that its decision to terminate the employment of these five indi-



viduals was solely motivated by its legitimate business need to reduce staff, and was not motivated in any way by the respondent's knowledge that the employees on the night crew at Parkdale were involved in the union's organizing campaign. The respondent's position is that some twenty-five to thirty positions were eliminated across the chain and that the grievors were caught up by this larger reduction in staff.

26. There is evidence that in July 1991 employees in the night crew position were terminated at some of the other stores and that a number of employees in shipping or driver assistant positions at the distribution centre were let go. At Fairview three full-time employees on the night crew left voluntarily on July 8, 1991 (see Exhibits 9-18). A part-time employee on the night crew at Fairview with 0.2 years of service was let go on July 8, 1991. At the Fairview store, however, employees on the night crew were offered the alternative of performing stocking functions on a day shift. One of these employees, Ms. Lundie, testified that she declined this offer of alternate employment and in the result resigned. It is not apparent what action would have been taken absent the voluntary departure of these employees. Exhibit 25 however discloses that on July 17, 1991 a part-time cart person was transferred to a part-time stock clerk position at the Fairview store.

27. Exhibit 11 identifies four full-time employees terminated from the night crew at the St. Catharines store on July 4 and 5, 1991. Exhibit 22 identifies only two of those employees as having their employment terminated and classifies one of them in sales. Exhibit 25 discloses that on June 30, 1991 two part-time members of the night crew at St. Catharines were transferred to the warehouse. The reason for the transfer is not indicated. Three or four employees worked the night crew at the Main St. W. store. Exhibit 16 refers to one employee leaving for personal reasons on July 12, 1991. Mr. Reid testified that two others had prior sales experience and transferred to days in that capacity.

28. In challenging the assertion by the respondent that it had eliminated jobs through the chain, the applicant sought to lead evidence that the night crew had been subsequently re-instituted at the Fairview store. It's evidence on the point was hearsay and although the panel allowed the evidence to be called (with Mr. Ronson dissenting), while advising the respondent that it would be entitled to some greater latitude in reply if required, the evidence was not challenged by the respondent. There is evidence in Exhibit 22, filed by the respondent, that on September 9, 1991 Kevin Hietikko was hired on a part-time basis in the classification of night crew and on October 22, 1991 Mark MacDougall and Mike Wilkins were hired on a full-time basis into the classification of night crew. We note that on August 14, 1991 the respondent sold its business. While we may not have the exact legal names, the respondent was structured as a joint venture between Wentworth Lumber Ltd. and Beaver Lumber Co., whereas it now is 100% owned by Beaver Lumber Co. Ltd. We note that Mr. Reid, while not employed as Vice-President and General Manager of the successor, was retained in an active consulting role.

29. Mr. Reid testified that the reason the grievors were let go was that there were no other jobs available for them, although he acknowledged that they would have been qualified to perform other work. Mr. Bonitatibus however testified that these individuals were not offered alternate employment because none of them were qualified, in that in his view all other positions required customer contact. Having heard the evidence of both Mr. Reid and Mr. Bonitatibus and two of the five grievors and in light of the nature of the jobs themselves, we have little doubt that the grievors could have performed other functions within the store. We are also satisfied that the grievors, having performed functions throughout the store, would be more valuable to the employer than a new hire with no experience given their knowledge of the store and its products.

30. Inherent in both these rationales however, is an acknowledgement that the grievors were considered, or could have been considered for other positions (but there were none, or if there were, they weren't qualified). This is so, even if as a more general proposition, the respondent did not recognize any principle of seniority or a bumping process in the event of a lay-off. Yet no consideration is evident, nor were the grievors so advised. They were told that their employment was terminated. We have concluded they were qualified to perform other work. The respondent says there were no positions available. The evidence on this point is limited, but following the terminations, two part-time employees were moved from the warehouse/drive-thru area to perform stocking functions and those part-time employees were replaced. It appears the two transferred employees were performing stocking functions each in excess of twenty-four hours per week. The respondent had no difficulty with the grievors performing stocking functions. On that basis alone, work was available. Four of the five grievors, prior to moving to the night crew, had been employed on a part-time basis. Mr. Daiglesh, the member of the night crew with the least experience and someone who was more closely aligned to management, was retained. Exhibits 22 and 23 confirm that new employees were hired (primarily on a part-time basis) throughout the summer and into the fall of 1991 at all the stores. In May, 1991 six part-time (five warehouse and one cleaning) and two full-time employees (including Mr. Daiglesh) had been hired at Parkdale. Excluding sales positions, there were eight new part-time employees hired between July 1 - September 5, 1991 at Parkdale (two at cash, two for carts, and four in the warehouse). In addition, the respondent was advertising in the local paper for individuals interested in part-time positions in cash, sales, warehouse and stocking departments with day, evening or weekend shifts at all stores.

31. Did the respondent carry out Mr. Reid's stated instruction to eliminate some twenty-five full-time positions? Why did the respondent terminate the employment of the grievors and choose not to offer alternate employment or offer any opportunity for recall? The respondent's decision to eliminate full-time positions at the end of June, 1991 is inconsistent with its stated position in April, 1991 to cut costs by increasing hours of work. The respondent's policy in the spring of 1991 recognized an employee's interest in job security. The basis for Mr. Reid's decision to eliminate twenty-five to thirty jobs was a review of sales figures over a three week period June 4 - July 2, 1991. He made the decision in late June apparently before these figures became available. No such drastic measure had ever been taken before by this employer. While the respondent did not meet its sales projections during this period the short-fall was not as great as that experienced in April, 1991 at which time hours were increased in order to avoid job loss. Mr. Reid had the stores revert to a normal work week effective June 16, 1991 based on three weeks of increased sales activity from May 21 - June 4, 1991. Even if it was overly optimistic to revert to the normal work week based on only three weeks of sales activity, the stated response to the decline in sales activity over the next three weeks appears extreme in the context of the respondent's earlier approach.

32. The parties were not in dispute concerning the applicable legal principles to be applied in determining whether or not the respondent had committed an unfair labour practice. That test was summarized in *Barrie Examiner*, [1975] O.L.R.B. Rep. Oct. 745 in a passage often referred to:

"... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred".

33. It is difficult to conclude on the evidence that twenty-five to thirty full-time positions were eliminated. It is also difficult to conclude on the evidence that at least some of those full-time



positions did not become part-time positions and were filled accordingly. There was some reduction in the workforce. At the same time, however the coincidence of timing between the union's organizing campaign and these efforts taken by the employer cannot be ignored.

34. The timing of these decisions cannot, in our view, be divorced from the events occurring in the organizing campaign. The respondent increased the work week effective April 1, 1991. It then learned of the union's organizing campaign but Mr. Reid, at least, felt the activity did not warrant the distribution of Exhibit 8. On June 4, 1991 the union held its first meeting and Mr. Reid was aware from increased complaints from employees that the organizing activity seemed to be increasing. The memo advising against solicitation for or against the campaign was posted on June 11, 1991 and Exhibit 8 was distributed to each employee. That letter sets out certain employee rights but also makes clear to employees that the respondent is not a disinterested party in the matter. It states it does not believe employees need to pay a third party to represent their concerns and suggests employees bear in mind some of the benefits they enjoy which are sometimes taken for granted. As of June 16, 1991 the work week reverted to normal, resulting, it can be assumed, in a benefit to the full-time employees at all the stores. Mr. Reid was aware that members of the night crew at Parkdale were involved in the organizing campaign. It is apparent that employees would have been aware of this as well, as this was the source of Mr. Reid's knowledge. Mr. Reid then decided in mid-June to conduct a "test" and move the Parkdale night crew to afternoons when he could better observe their work. His presence in the store increased significantly. The stated purpose of the test was to prove that stocking functions could be performed while the store was open without disruption to customer service. Yet he was (as were the store managers) already familiar with this work method. It was in place prior to the introduction of the night crew and had apparently been of sufficient concern so as to motivate the change to night crews. In late June Mr. Reid concluded that that concern was unwarranted. The decision to reduce staff and more particularly, the night crew, was taken. This approach to controlling costs was inconsistent with the approach taken prior to learning of the union's organizing campaign. While the respondent does not generally recognize a principle of seniority, there was at least some other work available for which the grievors would have been qualified and which, if offered, would have been consistent with the respondent's stated policy of seeking to avoid the lay-off of full-time employees. Alternate work was offered to some employees in other stores. We note that even if the store managers retained some autonomy in implementing Mr. Reid's directive, that does not explain the treatment of the grievors compared with employees in other stores. The reason for termination given by Mr. Bonitatibus is inconsistent with that expressed by Mr. Reid, and, on a review of the evidence, does not itself withstand scrutiny. Mr. Bonitatibus was equally aware of the organizing efforts at Parkdale. The respondent increased the hours of work in April also as a means of avoiding having to hire more part-time employees for the spring and summer seasons. Hiring of part-time employees occurred after the termination of the grievors' employment.

35. Overall, these actions are inconsistent with a conclusion that the decision to terminate the employment of the five grievors was motivated solely for legitimate business reasons, and free of any consideration of the grievors' involvement in trade union activity. In the result, we find that the respondent violated sections 65, 67 and 71 of the Act in terminating the employment of Steven Burch, Joe Mascaroni, Neil McLean, Sean Stewart and Kevin Young, and order the respondent to reinstate the grievors to employment with full compensation for wages and benefits lost, including interest. We reject the submission of the respondent that reinstatement is not an appropriate remedy in these circumstances where there is a successor employer and where jobs were eliminated. The complaint was filed prior to the sale of the business so any successor, it can be assumed, would or should be aware of potential consequences in the result. The evidence suggests that the new company retained the employees. But for the illegal conduct of the respondent the grievors would have been so employed. We have also considered the option of ordering the respondent to offer a



recall opportunity to the grievors for work for which they might be qualified. The remedy is insufficient however for it does not address the real possibility that, absent the employer's illegal conduct the grievors might not have been subject to any reduction in work. The possibility that counsel advanced, that employees may now have to be displaced as a result of a remedial order reinstating the grievors, arises, if at all, because of the employer's illegal conduct. The panel will remain seized with respect to the issue of compensation should the parties be unable to resolve it themselves. All other allegations contained in the section 91 complaint are hereby dismissed.

36. The remaining issue to be determined is the applicant's request for relief pursuant to section 8 of the Act. The conditions and purpose of section 8 were set out in *Di-Al Construction Limited*, [1983] OLRB Rep. March 356:

... certification pursuant to the provisions of section 8 of the Act was designed as both a deterrent to illegal employer interference in union organizational campaigns, as well as a device to provide a meaningful and effective remedy in those areas where an employer's interference has operated to destroy the free selection process guaranteed by section 3 of the Act. The wording of the section makes clear that certification under section 8 can only be granted if three conditions are satisfied, namely;

- (I) The Act has been violated.
- (ii) The true wishes of employees are not likely to be ascertained in a representation vote, or otherwise.
- (iii) In the opinion of the Board, the applicant has membership support adequate for the purposes of collective bargaining.

We have already concluded that the respondent violated sections 65, 67 and 71 of the Act. Therefore the first condition is satisfied.

37. With respect to the application of the second and third elements of section 8 we refer to the comments in *Nepean Bus Lines Inc.* [1990] OLRB Rep. Mar. 295:

19. The Board next deals with the second element, namely, that the contraventions must have resulted in a situation wherein the true wishes of the employees are not likely to be ascertained through a representation vote. Substantial employer misconduct is required to justify this extraordinary remedy of certification pursuant to section 8: *Radio Shack, supra*, upheld 79 CLLC ¶14,216 (Ont. Div. Ct.); *Ex-Cello Wildex, Canada*, [1977] OLRB Rep. June 370; *Manor Cleaners*, [1982] OLRB Rep. Dec. 1848. The Board does, however, look to the cumulative impact of the employer's illegal activities: *K Mart Canada Ltd., supra*; *Robin Hood Multi-Foods Inc., supra*. In this case, there were illegal terminations of the all union organizers (Pilon, Bigras, Zakutney, Chretien) and the unlawful refusal to retain Jean Jahn for a reasonable period to train her replacement. As well, the Board notes the attempt by Iva Stewart to attend the union meeting and the tension amongst the employees who actually showed up at the union meeting. There is no doubt the employer misconduct was substantial. The cumulative impact was even greater. The Board must assess whether the remedies which could be directed with respect to the violations of the Act would effectively "restore the atmosphere" to the point where the union could continue to conduct its campaign. The Board does not consider that possible in the instant case. Viewed objectively, it is reasonable to conclude that the employees would have been so intimidated [sic] by the respondent's unlawful conduct that remedial directions for the section 89 violations would not dispel the chilling effect. The Board concludes that their true wishes are not likely to be ascertained in a representation vote.

20. Finally, the Board considers the third element, whether the membership support is adequate for purposes of collective bargaining.

21. It is useful to refer to a relevant passage in *Manor Cleaners Limited, supra*, at this point:

21. The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

...

In assessing adequacy the Board must engage in some measure of speculation regarding the union's prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mustered the totality of its support in the bargaining unit, certification under section 8 should not be used to foist union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline*, *supra*, at paragraph 62).

38. The applicant filed valid evidence of membership on behalf of eighteen persons, eleven of whom were employees in the bargaining unit on the application date (out of a total of thirty-three employees). Three cards were signed on April 29, 1991, one on May 6, 1991, four on June 4, 1991, two on June 6, 1991 and one on June 18, 1991. The application for certification was filed on July 15, 1991 and July 30, 1991 was set as the terminal date. Apart from the evidence of the union's organizing campaign outlined earlier (that is, that it began slowly in April 1991 with the first meeting held on June 4, 1991) we have no other evidence with respect to the conduct of the campaign following June 4, 1991. Employees would have been aware in early April 1991 that the respondent was concerned about its financial position. It would also be reasonable for them to assume that some of this concern had been alleviated by June 10, 1991 when the work week returned to normal, although the wage freeze continued in effect. Throughout this period, the respondent was seeking to reassure employees about any concern of job loss. Employees would, no doubt, have responded favourably to the respondent's action on June 10, 1991. Exhibit 8 was received by employees at about the same time, advising them to consider the benefits that they did enjoy. It is reasonable to conclude from the evidence that employees knew or believed that members of the night crew were involved in the applicant's organizing campaign. The fact of the campaign itself appears to have been well-known. It would also be apparent to employees following the termination of the grievors that at least some of the stocking work remained by virtue of the fact that two previously part-time employees from the warehouse were performing stocking functions commencing the week immediately following the terminations. This work force is made up largely of young people working part-time, including both high school and university students. The two grievors who testified are both in their early twenties. They have, in relative terms, a fair length of service with the respondent.

39. Given the evidence of the organizing campaign, it is arguable that the applicant was not receiving the wholehearted support of the employees, or that its campaign was somehow spent. Over a period of approximately one and a half months the applicant did obtain membership support on behalf of thirty-three percent of the bargaining unit. It appears there was initial interest and renewed interest in June at the time of the union's first meeting. During the month of June, 1991 there was considerable activity in the workplace both with respect to issues of job security and the knowledge of the trade union's organizing campaign. Whatever doubt we may now have concerning the employees' appetite for collective bargaining arises because we are now unable to assess their true wishes free of the effects of the improper interference by the respondent. This is the type of situation that section 8 was designed to remedy.



40. The respondent terminated the employment of fifteen percent of the employees in the bargaining unit in violation of the Act. The severity of that employer conduct would, in and of itself, speak to a chilling effect at the time of, and following, the terminations. With respect to the assessment of whether the true wishes of the employees are likely to be ascertained through the holding of a vote the Board has in earlier cases concluded that violations of the Act arising from threats to the job security of employees are such that the ability of the employees becomes one of choosing between continued job security rather than whether they wish to be represented by a trade union or not (see *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848 at paragraph 19 and the cases cited therein. See also *Knob Hill Farms Limited*, [1987] OLRB Rep. Dec. 1531 at paragraph 64 and the cases cited therein).

41. In the circumstances outlined we are satisfied that viewed objectively, it is reasonable to conclude that employees would associate the termination from employment of the five grievors with their union activity notwithstanding the respondent's stated business purpose. No notice was provided to employees concerning any overall reduction in staff throughout the chain. The terminations would have resulted in a substantial "chilling" of the applicant's campaign. Notwithstanding the employer activity, particularly in June, including the reversion to the normal work week, the distribution of Exhibit 8, and the increased observation of the night crew on afternoons, the applicant was able to obtain the support of thirty-three percent of employees in the bargaining unit. In these circumstances we are persuaded that the true wishes of the employees are not likely to be ascertained and that the applicant has membership support adequate for collective bargaining.

42. Therefore, we hereby certify the applicant as bargaining agent for the bargaining unit of employees of the respondent described at paragraph 6 of the Board's decision of August 26, 1991. Further we order the respondent to reinstate the grievors to employment in accordance with paragraph 35 of this decision, and finally, to post in the workplace in conspicuous places where it will come to the attention of the employees, the notice attached as Appendix A to this decision. We are cognizant of the fact that a successor legal entity appears to now operate the store and the notice therefore reflects that it is the conduct of the respondent that has been called into question here. The Board will remain seized to ensure that the notice to employees is brought to the employees' attention.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON; May 13, 1992**

1. Those employers who are trying to carry on business during the toughest economic climate since the 1930's should read this decision with a careful eye. Those employers who run a retail sales business by means of a head office and various retail stores operated as independent profit centres by local managers, might have some special concerns.

2. They may be concerned with the Board's approach to decision making as it applies to such a retail concern. For they will see that the Board has found that a decision to cut costs made at the head office level, and applied in the same manner to each retail outlet, can nevertheless constitute an unfair labour practice with respect to one specific store. If the head office decision is illegal, they might wonder why all the employees affected by it are not entitled to a remedy, and not just those who came before us under a union umbrella.

3. They may be concerned when they read how a decision of a local manager, (operating a retail store as a profit centre independent of the other stores), can somehow be found to apply to all the retail stores. Thus the failure of another manager, at another store at another location with a totally different work force, to make the same decision is found to be an unfair labour practice.



4. Lastly, they may wonder how the Employer in this case can comply with the Board order to reinstate various employees on a full time basis when the only evidence before the Board is that no full time work exists for them to perform, and throughout the hearing the employees were complaining that they had not been given a chance to perform part time work at "their" store following their terminations.

5. I do have these concerns, and that is why I disagree with my colleagues in their disposition of this matter.

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**3661-91-R; 3646-91-G; 3656-91-R** International Brotherhood of Electrical Workers' Local 353, Applicant v. **Bemar Construction (Ontario) Inc.**, Respondent; International Brotherhood of Electrical Workers' Local 353, Applicant v. J.C. Electrical, Division of 948641 Ontario Limited, Respondent; International Brotherhood of Electrical Workers' Local 353, Applicant v. 948641 Ontario Limited c.o.b. as J.C. Electrical, Bemar Construction (Ontario) Inc., Respondents

**Adjournment - Certification - Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Related Employer - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjournment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere**

**BEFORE:** R. O. MacDowell, Alternate Chair, and Board Members F. B. Reaume and J. Redshaw.

**APPEARANCES:** Elizabeth Mitchell and Michael Oram for the applicant; Lawrence Ryan and Youssef Daou for Bemar Construction; John Calderon for J.C. Electrical.

**DECISION OF THE BOARD;** May 5, 1992

## I

1. This is an application for certification which was scheduled for hearing together with a related application under section 1(4) of the *Labour Relations Act*, and a reference to arbitration under section 126 [formerly 124] of the Act.

2. These applications are related because, in essence, the union is pleading in the alternative. In the certification application, the union seeks to establish bargaining rights for electricians working for Bemar. In the 1(4) application, the union asserts that Bemar and J.C. Electrical are really "one employer" for labour relations purposes, because J.C. Electrical is a mere shell that, in reality, is an emanation of Bemar, in separate corporate garb. Since J.C. Electrical and Bemar are "one employer" for the purposes of the Act, the collective agreement with J.C. Electrical binds Bemar as well. The section 126 reference asserts that J.C. Electrical - and by implication Bemar - has failed to remit the wages and benefits owing to employees under the terms of that agreement.

3. These matters came on for hearing before the Board on March 27, 1992. The applicant union (on its own behalf and on behalf of the unpaid employees) was represented by counsel. The respondents were not. We shall have more to say about that later.

4. For ease of explanation, it may be useful to record certain provisions of the *Labour Relations Act* and the *Statutory Powers Procedure Act*, to which reference will be made below. These are as follows:

**Labour Relations Act**

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

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126.-(1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 45, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

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104.-(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

(14) The Board may, subject to the approval of the Lieutenant Governor in Council, make rules to expedite proceedings before the Board to which sections 119 to 138 apply, and the rules may provide that, for the purposes of determining the merits of an application for certification to which sections 119 to 121 apply, the Board shall make or cause to be made such examination of records and such other inquiries as it considers necessary, but the Board need not hold a hearing on such an application.

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105.-(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;
- (b) to administer oaths and affirmations;
- (c) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;

**Statutory Powers Procedures Act**

9.-(1) A hearing shall be open to the public except where the tribunal is of the opinion that,

- (a) matters involving public security may be disclosed; or
- (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing concerning any such matters *in camera*.

(2) A tribunal may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

10. A party to proceedings may at a hearing,

- (a) be represented by counsel or an agent;
- (b) call and examine witnesses and present his arguments and submissions;
- (c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

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12.-(1) A tribunal may require any person, including a party, by summons,

- (a) to give evidence on oath or affirmation at a hearing; and
- (b) to produce in evidence at a hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceedings and admissible at a hearing.

13. Where any person without lawful excuse,

- (a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or
- (b) being in attendance as a witness at a hearing, refuses to take an oath or to make an affirmation, legally required by the tribunal to be taken or made, or to produce any document or thing in his power or control legally



required by the tribunal to be produced by him or to answer any question to which the tribunal may legally require an answer; or

- (c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal or by such party, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

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**23.-(1)** A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

(2) A tribunal may reasonably limit further cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

(3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

## II

5. At the opening of the hearing and throughout the opening submissions, the respondents' representatives insisted upon maintaining a tape-recorder in continuous operation and using a hand-held video camera which periodically swept the room (i.e. the podium, counsel table and public area). We mention "continuous operation" because the respondents' representatives insisted that they had the right to tape-record everything from the moment they entered the building - that is, the Board proceedings themselves, anything said during breaks or lunch periods, conversations with a Board Officer or union counsel in connection with simplifying or settling the dispute, and so on.

6. Counsel for the union urged the Board to restrict or prohibit this activity which she described as intrusive and disruptive. Indeed, certain individuals in the public area vociferously objected to their presence being recorded on video tape; and that objection led to a brief physical altercation when the respondents' representative (Mr. Ryan) indicated that he intended to video-tape whatever and whenever he wanted. Similarly, the union's advisors at the counsel table objected to the video tape recording of their presence.

7. Mr. Ryan replied that since the Board's proceedings were "public", he had a right to record and video-tape everything that occurred in connection with the hearing. He submitted that a video tape recording would assist in identifying witnesses, and help ascertain who was speaking (counsel, witnesses, Board members) if the tape-recording was later used to make a written transcript of the proceedings.

8. With respect to the tape-recording, the Board ruled, as it has done in the past, that any party was entitled to retain the services of a court reporter to make a transcript of the proceedings and, by implication, any party was likewise entitled to use an electronic recording device to assist it in taking notes. So long as the use of a tape-recorder did not interfere with the proceedings, no

objection could be taken to it. The Board noted, however, that such recording made by one party to the case is not an “official” Record of the Board’s proceeding, nor would any transcript made from one party’s recording be a part of the Board’s Record. Obviously, the Board has no control over what will be recorded or when, whether any resulting transcript will be complete or fragmentary, and whether the tapes have been, or could be, tampered with.

9. With this caveat, though, the Board saw no reason why it should not permit the respondents’ representatives to use a tape-recorder. If the union, its counsel, its advisors, or the employees it represents, are discomfited by the fact that their conversations might be surreptitiously tape-recorded during breaks, or in the halls, they can simply conduct themselves in light of that possibility. Those are not matters with which the Board need be concerned.

10. The use of the hand-held video camera raises different considerations, which ultimately prompted the Board to decide that it should not be permitted.

11. The Board noted that these three related applications include an application for certification in which the union sought to represent a group of employees said to be employed by Bemar Construction. We mention this specifically because certification applications are always sensitive matters from an employee’s point of view - a fact that the Legislature has recognized in section 113 [formerly 111] of the Act regarding the confidentiality of records that *may* disclose whether or not an individual is a trade union supporter. The statute provides that such information is confidential and must not be disclosed. Thus, the “privacy interest” asserted by the union finds at least an echo in the statute. The statute recognizes that employees may be legitimately sensitive, and legitimately apprehensive, about the means by which their employer may discover whether or not they support the union; and, as we have already noted, at least one individual sitting watching the proceedings has strongly objected to being video-taped. Of course, the “right” to video-tape may not depend upon the nature of the proceedings, but the circumstances graphically illustrated why the use of the video camera could be distracting and disruptive.

12. There is no indication or undertaking from the respondents’ representatives about who will be video-taped, or when, or for what purpose. Nor are we confident that any such undertaking would be adhered to. The only reason for the video tape was that mentioned above (i.e., to identify who was speaking) and Mr. Ryan’s assertion that he had a “right” to video-tape the proceedings because his company was a party and the hearing was “public”.

13. The Board is not a domestic tribunal, but rather a statutory one to which the *Statutory Powers Procedure Act* applies; however, the *Statutory Powers Procedure Act* does not deal with this matter. Section 9(1) contemplates that hearings will be public unless there are unusual circumstances not here present. Section 9(2) empowers the Board to make ancillary orders to maintain order at the hearing. Section 23 provides further powers to control its proceedings and prevent an abuse of process. The *Statutory Powers Procedure Act* does not require a transcript, and contemplates that tribunals may proceed (as this Board does) without such formality. The *Labour Relations Act* does not require a transcript either. Finally, section 104(13) of the Act empowers the Board to determine its own practice and procedure (see *supra*), but leaves it to the Board to work out what that requires in a particular case if the issue is not governed by the rules (as this one is not). Nowhere does either statute contemplate one party video-taping the proceedings (and the other parties), and, of course, the hearing rooms are not equipped to accomplish that task in a neutral and unobtrusive manner.

14. That is the statutory framework within which the Board operates and, as will be seen, it does not address the issue of a party using a portable video camera in the hearing room for such purposes as that party considers appropriate. The respondents were not able to draw our attention



to any other Court or tribunal - or any decision by any Court or tribunal - where this is permitted or which would assist us; and, we are unaware of any such decision, or of any Court or tribunal which permits a party to the proceedings to use a video camera in this way.

15. After weighing the parties' positions and representations, the Board was not persuaded that the balance of interests (including the privacy interests of the union's witnesses, advisors and supporters, the distraction caused by the camera, and the respondents' articulated need for it) supported the respondents' request. The use of the video camera was intrusive, interfered with the orderly conduct of the hearing, and was neither required by the relevant statutes nor necessary for a fair hearing under those statutes. We were not prepared, therefore, to permit the use of a video camera in the Board's hearing room during the proceedings. The Board directed that Mr. Ryan (or his associate) stop video-taping, and put the video tape recorder on the floor.

### III

16. Immediately following the Board's ruling on the use of the video camera, Mr. Ryan requested an adjournment so that he could take legal advice and launch an "appeal" of the Board's ruling prohibiting him from using his hand-held video camera. Mr. Ryan argued that he was entitled to seek legal advice in light of the Board's ruling. He maintained that there were cases or "law" which contradicted that ruling - even though he could not be more specific than that. The union resisted any adjournment. The union argued that an adjournment would merely delay these proceedings, and prejudice the rights which it is seeking to assert, and which, the statute contemplates should be dealt with as expeditiously as possible.

17. The Board denied Mr. Ryan's request for an adjournment.

18. These proceedings have been scheduled for some weeks, and the respondents have had ample opportunity to retain and instruct counsel. They chose not to do so. The notices of hearing specifically advise that the parties appearing must be prepared to address all issues raised on these applications; and, whether or not the respondents knew that its use of a video camera would be controversial, they were obliged to be ready to deal with that issue when called upon to do so. There is no basis for granting an adjournment to permit Mr. Ryan to search out cases which, he says, would support his position, nor, in the circumstances, is an adjournment warranted so that he can take legal advice or explore the possibility of an "appeal" of the Board's ruling.

19. It is now well established that "time is of the essence" in certification matters - especially in the construction industry where commercial activity and employment opportunities are transitory. In the words of Estey, C.J.O. (as he then was), the "overriding principle invariably applied, is that labour relations delayed are labour relations defeated and denied" (see *Journal Publishing Company of Ottawa Limited v. Ottawa Newspaper Guild, et al*, [unreported March 31, 1977, Ontario Court of Appeal]. In *Hotel and Restaurant Employees et al v. Nick Masney Hotels Limited*, (1970) 70 CLLC ¶14020, Laskin, J.A. put it this way:

"The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract, where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to the union, to the employees, and to an employer, and certification is merely the first step of a laborious collective bargaining process".

This proceeding involves a certification application, as well as an application under section 126 of the Act; moreover, the Legislature has itself indicated the need for expedition in section 126 pro-



ceedings by prescribing that the Board must hold a hearing within fourteen days of the filing of such applications.

20. Finally, as the Court of Appeal observed in *Cedarvale Tree Services v. Labourers' International Union of North America*, [1971] 3 O.R. 832 (and the Board mentioned at the hearing):

“a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity, or quashing some order already made by which it assumed jurisdiction”.

It follows, we think, that the Board is not required to grant an adjournment, bringing its proceedings to a halt, merely because a litigant is unhappy with a particular procedural ruling and wants the opportunity to seek legal advice - particularly where, as here, that litigant had ample opportunity to have counsel present in the first place.

21. There was no basis for an adjournment, and no reason why the Board should not proceed to hear these matters; and in this regard, the Board reminded both of the respondents about the evidentiary onus cast upon them by section 1(5) of the Act. That section specifically requires the respondents to adduce the “commercial facts” relevant to the application.

#### IV

22. Following this ruling, there was a further interchange between the parties about the appropriate order of proceeding. The Board ruled that it would proceed first with the section 1(4) application, since the identity of the employer for labour relations purposes was an integral aspect of the other two proceedings. If, as the union claims, the two corporate respondents should be treated as “one employer” for labour relations purposes, that may be dispositive of the certification application. It is also relevant to questions of liability, under the collective agreement upon which the 126 referral is based. It seemed sensible to proceed with the section 1(4) issues first, and the Board so ruled.

#### V

23. The Board then turned to the various complaints which the respondents' representatives raised about revealing or producing the commercial documents respecting their business relationship. The union contended they were relevant to the 1(4) application and the union had subpoenaed them (i.e., moved to compel their production in addition to and quite apart from section 1(5)). The respondents' representatives advised the Board that they had with them at least some of the documents to which the subpoenas related, but they refused to produce them and objected to any advance disclosure. They also objected to producing the material mentioned in a summons which had been served upon the respondents.

24. In the result, the Board decided that it was unnecessary, at this stage, to rule on the propriety or scope of the subpoena. The Board directed that Mr. Calderon produce those documents which he had with him, which he indicated he was prepared to produce eventually (because he intended to rely on them) and which he was obliged to produce pursuant to section 1(5) of the Act in any event.

25. Following that ruling, Mr. Ryan undertook to produce the documents which he had

with him. Then he refused to reveal them prior to their formal introduction in evidence. Then he provided union counsel with a copy of this material. Then, he crossed the hearing room and snatched them back from the counsel table.

26. However, despite this interruption, Mr. Calderon did agree to produce his documents; and since he was content to proceed first and lead his evidence on the relationship between the respondents, the hearing on the merits of the section 1(4) application eventually got underway. But by that time half a day had been devoted to procedural wrangling.

27. Since the case is scheduled to continue over several more days, it may be useful to make some further comments.

## VI

28. The Board wishes to make it clear (as it did at the hearing) that the respondents are obliged to comply with the evidentiary onus cast upon them under section 1(5) of the Act, and, in addition, the Board has the authority under both section 105 of the *Labour Relations Act* and the *Statutory Powers Procedure Act* to direct that any documents, which are arguably relevant, must be produced. At this stage, we do not think that it is necessary to address the scope of the subpoena served upon the respondents' official, or the quality of that service, or whether "privilege" of some sort can be claimed in respect of such documents, or even whether such documents are arguably relevant and must therefore be produced whether or not particular weight is eventually assigned to them. *It is sufficient to direct, as we do, that all parties list and produce all documents within their direction, care or control or to which they have access, and upon which they intend to rely. Such documents must be produced to the party opposite not less than 10 days prior to the date upon which this hearing is scheduled to re-convene, that is, no later than June 12, 1992.*

29. In our opinion, such pre-hearing disclosure is essential to the expeditious resolution of the matters before us. Insofar as possible, the parties should not be caught by surprise or put at a disadvantage by the unforeseen production of unfamiliar documents. Nor should either party be able to secure a tactical advantage or delay by withholding relevant material. As we have already mentioned, proceedings of the kind now before us should be dealt with as expeditiously as possible, and while resource constraints inevitably pose limits upon how quickly the Board can respond to any particular application, the Board has a responsibility to ensure that the hearing time is used productively.

30. It is worth repeating that the scheme of the Act itself envisages that construction industry representation cases, and construction industry arbitration proceedings, will be dealt with expeditiously. There are policy and historical reasons for that. In the absence of an effective means to resolve representation questions, or secure redress for non-compliance with a collective agreement, unions would be tempted to resort to strikes and picketing to force employers to comply with their legal obligations. That was, in fact, a common union response not so many years ago, when the statute lacked an effective legal mechanism to resolve these problems, and employers could both create and delay to defeat legitimate claims. If legal channels are frustrated, for whatever reason, parties will be tempted to resort to self help; and it is that reality which promoted the Legislature to design a system which is supposed to provide expeditious avenues for relief.

## VII

31. It is also appropriate to make some comment about the standards of decorum to which parties appearing before the Board must adhere - whether or not they are represented by counsel.

32. Proceedings before the Board are designed to be less formal than those in a Court. Parties are entitled, but not specifically required, to be represented by counsel; moreover, one cannot expect a layman to conduct himself like a lawyer or to appreciate fine points of procedure. On the other hand, a layman cannot be permitted to secure an unfair advantage, create prejudicial delay, or otherwise frustrate the proceedings, simply because he is unfamiliar with his legal rights, (or claims to be) or he is disinclined to abide by the Board's rulings. An unrepresented litigant is entitled to a fair hearing, but he is not entitled to be argumentative, disrespectful, interrupt the Board or counsel opposite, or otherwise behave in a manner inconsistent with the orderly conduct of a Board proceeding. That is why section 9(2) of the *Statutory Powers Procedure Act* (as well as section 104 of the *Labour Relations Act*) gives the Board the authority to regulate the conduct of parties in proceedings before it, and that is why the Board has the power under section 23(3) of the *Statutory Powers Procedure Act* to exclude from the hearing anyone other than counsel.

33. We observe, parenthetically, that the respondents in this matter are *corporations*, not the individuals who control, or here represent them; and, it is interesting to note that if this were a Court, a corporation would have to be represented by a solicitor, except with leave of the Court (see: Rule 15.01(2) of the Rules of Civil Procedure). Mr. Ryan and Mr. Calderone could not appear as agent as of right, and they have no such absolute right in this forum either. This is not to say that the civil rules apply in proceedings before the Board, or that the Board must always respond in the way that a Court would. But when sections 10(a), 23(1) and 23(3) of the *Statutory Powers Procedure Act* are read together, it appears that a corporate respondent does not have an absolute right to be represented by the agent of its choice (not being a solicitor), regardless of how that agent conducts himself. Under the *Statutory Powers Procedure Act* and the *Labour Relations Act*, the Board has the power to deal directly with contempt or other inappropriate conduct in the face of the tribunal.

34. The respondents must also understand that a hearing before the Board is not an argument. The Board is not required to engage in debate, or explain the law to them step by step, or explain the nature of the legal arguments made by the trade union, or which might be open to them. Indeed, it would be quite inappropriate for the Board to give legal advice, or to explain the arguments which the respondents might make, or to outline the options available to them, or the legal consequences or contingencies involved in these proceedings. Those are matters that the respondents should pursue with a solicitor; and the Board here repeats the recommendation made repeatedly at the hearing, that the respondents discuss their concerns with a lawyer experienced in labour relations law.

35. They are not required to do so, of course. They are entitled to appear on their own, tender evidence which is relevant (but not irrelevant evidence) and respond to the legal issues which arise in these matters (which they may or may not be able to independently identify or adequately address). But they are not entitled to pursue irrelevancies, make speeches, interrupt or make pejorative remarks to counsel opposite, or address argument to issues not crystallized in the case before us. Nor does a party's "right to be heard" or "right to have his day in court" oblige the Board to hear witnesses simply because such party asserts that, in its opinion, the witness is someone that the Board ought to hear from or it proposes to call. The witnesses' evidence must be directed to a factual or legal issue in dispute, and have arguable probative value.

36. The respondents also run the risk - as the Board advised them at the hearing - that a valid legal point will not be recognized or developed, potentially significant arguments may be missed, and potentially relevant facts (in their favour) may not be established in evidence. It would be unfortunate if the case for the respondents was not adequately put because their representatives' efforts were unfocused or misdirected.



## VIII

37. The parties have advised the Board that they anticipate that the first phase of this proceeding (i.e. the “related employer” issue) will take some 12-18 hearing days to complete. It is not at all clear to the Board why so many hearing days would be required, nor is it evident from the parties’ pleadings. In the Board’s experience, in cases such as this, the “commercial facts” concerning the respondents’ business relationship are seldom in dispute, nor is there usually much evidence that is relevant to the exercise of the Board’s discretion. And section 1(4) has been part of the statute for almost twenty years, so there is a well-established jurisprudence, affirmed, from time to time, by the Divisional Court.

38. Quite frankly, we find it difficult to discern what evidence could consume that much hearing time; for Mr. Calderon indicated that his evidence “in chief” could probably be completed in one day, and counsel for the union indicated that she did not anticipate an extensive cross-examination because, in her experience, the “commercial facts” were largely incontestable. Be that as it may, and out of an abundance of caution, the Board put on “temporary hold” a further 12 hearing days (which we canvassed with the parties at the hearing) - with the caveat that the parties should advise the Board, as soon as possible, whether this number of hearing days will ultimately be required. In scheduling those continuation days, we are prepared to accommodate the parties’ vacation schedules, but we are not prepared to eliminate all Mondays and Fridays as Mr. Ryan requested so that the litigation would accommodate his business meeting schedule. The initial days in the series (having regard to this panel’s availability) are: June 22, July 3, July 24 and July 29, 1992.

39. *In addition, pursuant to section 1(5) and section 104(13) of the Labour Relations Act (see supra), the Board directs that the respondents set out, in writing and in detail, all of the facts upon which they intend to rely and which they claim to be relevant to the disposition of the issues in these matters.* Such particulars are necessary in order for the Board to properly assess the amount of hearing time that will be necessary, and to ensure that these cases will progress, from start to finish, as expeditiously as possible. *Similarly, the union is directed to stipulate all facts upon which it intends to rely and of which it has knowledge (bearing in mind that section 1(5) of the Act recognizes that a trade union will not normally have knowledge of the corporate or business relationships between named respondents).* It appears to the Board that these more extensive particulars and pleadings will contribute to the orderly resolution of the matters in dispute. The parties are warned that if they do not fully particularize their positions, in advance of the continuation of hearing, the Board may decline to hear evidence about the “new matters” which they later wish to raise.

40. The Board directs that these full particulars and pleadings be provided by each party to the other (with a copy to the Board) within 10 days of the hearing - that is, no later than June 12, 1992 (which will give the parties more than a month to prepare them). *Each party is also directed to advise the Board, in writing, of its estimate of the total number of witnesses it intends to call and the total number of hearing days that, in its estimation, are likely to be necessary.* Upon receipt of that material, the Board will select from among the hearing days put “on hold” (and already canvassed with the parties at the hearing) such days as appear to be necessary to complete these matters.

41. In addition, if further dates become available because other cases in which this panel is involved either settle or finish earlier than anticipated, the parties may be so advised. As we have already mentioned, it is important to try to complete these matters in a timely fashion; and while there are obvious resource limitations, the parties and the Board must make the best use of the hearing time available.

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**3130-91-R; 3131-91-R; 3443-90-U; 3444-90-G** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. **Economy Store Fixtures Limited** and Flair Woodworking Ltd., Respondents v. Canadian Woodwork Manufacturers Association, Intervener; Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Complainant v. Economy Store Fixtures Limited, Respondent v. Canadian Woodwork Manufacturers Association, Intervener; Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. Economy Store Fixtures Limited, Respondent v. Canadian Woodwork Manufacturers Association, Intervener

**Construction Industry - Sale of a Business - Related Employer - Woodwork company sold by "F" going bankrupt - "F" incorporating new company, purchasing some of bankrupt company's equipment and carrying on substantially same business - Board finding "F" to be "key person" - Related employer declaration issuing - Board also finding sale of a business and declaring that union has bargaining rights for employees of successor employer**

**BEFORE:** G. T. Surdykowski, Vice-Chair, and Board Members W. N. Fraser and J. Redshaw.

**APPEARANCES:** N. L. Jesin and W. Oliveira for the applicant/complainant; Harry Urman for the respondents; no one appearing on behalf of the intervener.

**DECISION OF THE BOARD; May 25, 1992**

1. The name of the respondent Flair Woodworking Limited is amended to "Flair Woodworking Ltd."
2. At the hearing scheduled for these matters, the parties agreed that Board File No. 3444-90-G should be adjourned pending the disposition of the other matters herein. That matter is therefore adjourned *sine die* for a period not to exceed one year from the date of the hearing (March 25, 1992). If within that one year period no party requests, in writing, that it be scheduled for hearing, and it is not otherwise disposed of by the Board, the grievance in Board File No. 3444-90-G will be dismissed.
3. The parties also agreed that the Board should defer consideration of the unfair labour practice complaint in Board File No. 3443-90-U and addressed themselves to only the applications for relief under section 1(4) and (what is now) section 64 of the *Labour Relations Act* in Board File Nos. 3130-91-R and 3131-91-R respectively. Accordingly, the complaint in Board File No. 3443-90-U is also adjourned *sine die* for a period not to exceed one year from the hearing on March 25, 1992. If no party makes a written request for a hearing within that one year period, and the matter is not otherwise disposed of by the Board, that complaint will be dismissed.
4. There is no significant dispute between the parties with respect to the facts material to the applications in Board File Nos. 3130-91-R and 3131-91-R.
5. In 1965, Hillel ("Joe") Frid, together with someone named Shapiro, caused Economy Store Fixtures Limited, ("Economy") to be incorporated. Subsequently, Shapiro was bought out and Frid operated the business alone (although he was the beneficial owner of 2/3 of the shares of Economy and his wife, Nadia, was the beneficial owner of the remaining 1/3).



6. At some point, Economy became a member of the Canadian Woodwork Manufacturers Association. At all material times, the applicant/complainant was the exclusive bargaining agent for all employees of the member companies of that Association, including Economy, save and except non-working foremen and persons above the rank of non-working foreman, and office and sales staff, with respect to “all manufacturing of store fixtures and display units performed” by each such company “in its plant and/or plants” in the geographic area described as “the counties of Halton, Peel, Ontario and York, which includes the area known as Metropolitan Toronto”.

7. In June, 1989, Peter Sisley purchased all the shares of Economy. Among other things, the Agreement of Purchase and Sale in that respect provided for Frid to continue a relationship with Economy for what appears was intended to be a transition period.

8. Frid “worked for” Economy until May, 1990 (which we observe was well beyond the “maximum” six month period specified in the Agreement of Purchase and Sale). He then took a prearranged vacation. Upon his return in July, Frid, who apparently had not received a written notice sent in that respect, was told by Sisley that his services had been terminated.

9. Frid obtained employment as site superintendent with Arjeco Industries, a company with which he was acquainted through Economy. This employment lasted approximately two months.

10. On or about October 12, 1990, Economy filed an assignment into bankruptcy. The Trustee in Bankruptcy for Economy asked Frid if he was interested in purchasing the business. Frid said no. However, he did decide to get back into the business. For that purpose, Frid, together with someone named Natale Borzi, caused the respondent Flair Woodworking Ltd. (“Flair”) to be incorporated on November 6, 1990. (Frid, his spouse, Borzi, and someone who appears to be Borzi’s spouse are the directors of and equal shareholders in Flair.) In addition, Frid attended an auction of Economy’s equipment held on or about November 9, 1990 and purchased certain equipment, for which he paid between \$20,000.00 and \$25,000.00 out of total auction sales of approximately \$75,000.00, to be used by Flair. On behalf of Flair, Frid negotiated a lease for part of the premises which had been occupied by Economy and from which Flair has carried on business ever since.

11. Although characterized by counsel for Flair as a “new” business, Flair is operating substantially the same business as Economy, although on a reduced scale. Flair uses the Economy equipment it purchased at the auction as aforesaid and operates out of part of the premises formerly occupied by Economy. The work Flair does is substantially the same as Economy’s and its customers are substantially the same as well.

12. Section 1(4) of the *Labour Relations Act* provides that:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, *whether or not simultaneously*, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(emphasis added)

Section 1(4) is a remedial provision intended to prevent the intentional or incidental erosion of bargaining rights consequent upon changes in structure or form of what is, for labour relations purposes, a single business activity. To put it another way, whatever separation may exist between two



or more entities for corporate, tax or other purposes, this Board is entitled to treat them as one employer for purposes of the *Labour Relations Act* where such entities carry on associated or related activities or businesses under common control or direction. The purpose of the provision is to prevent form, or an alteration in form, from undermining a trade union's bargaining rights and the rights of employees to bargain collectively with their employer through that trade union. As the Board observed in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353, section 1(4) extends to situations where one business entity is actively carrying on business and another is not:

15. ... It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

(See also, *Metro Century Construction Ltd.*, [1983] OLRB Rep. July 1122.)

13. Until Sisley purchased the company, Economy was in every sense controlled and directed by Frid. Indeed, for all practical purposes, Frid was Economy. After the sale, Frid relinquished corporate control of Economy to Sisley. However, and while Frid tended to play down the significance of his role to Economy after Sisley purchased the company, his presence was clearly important to the commercial well-being of Economy. The Agreement of Purchase and Sale itself specifically provided that the purchase was being completed by Sisley in reliance on Frid remaining with Economy on the terms and conditions set out in Schedule "G" to that Agreement. Further, Frid remained with Economy well beyond the maximum transition period contemplated in the Agreement of Purchase and Sale. There is nothing in the evidence to suggest that Economy did poorly subsequent to the sale until after Frid's relationship with the company was terminated. Indeed, Frid's departure looks very much like the water-shed in the fortunes of Economy in the sense that the company rapidly descended into bankruptcy after he left.

14. The fact that there was a hiatus between the time Frid controlled and directed Economy and the birth of Flair does not detract from the fact that Economy and Flair are more than one entity engaged in a related activity or business under common control and direction, the key in that latter respect being Frid. As we have already noted, section 1(4) of the Act specifically provides that associated or related activities or businesses can be treated as constituting one employer for purposes of the Act even when they are not operating at the same time. The mere fact that an employer for whose employees a trade union holds bargaining rights ceases to operate will not cause those bargaining rights to disappear or become inert. If another entity controlled or directed by a person (or other entity) which exercised control or direction over the first one subsequently becomes engaged in an associated or related activity or business, the bargaining rights which attached to the first employer will also attach to the second, unless there are compelling labour relations reasons why they should not. Under the *Labour Relations Act*, bargaining rights attach to an activity or business, not merely to the legal vehicle through which the activity or business is carried on. Alterations in legal form, whatever the reasons or motivation for them, are not allowed to undermine or frustrate existing bargaining rights, either directly or incidentally.

15. On the evidence before the Board, Frid appears to be the key player in Flair. It appears that for all practical labour relations purposes he controls and directs that company (indeed, there

was no real suggestion that he does not). In our view, Flair is, in effect, Economy reborn. And Flair, like Economy, is the vehicle for Frid's business activity, an activity in which others have joined but primarily his nonetheless. Although it operates on a smaller scale, Flair is objectively indistinguishable from Economy for labour relations purposes. It is in the same business, operates from the same location, uses the same equipment, and its customers, with a few very minor exceptions, are the same as Economy's. And, just as Economy was under Frid's managerial control, so now is Flair.

16. Finally, the applicant/complainant's bargaining rights are at risk of disappearing along with Economy. This is precisely the sort of erosion of bargaining rights which section 1(4) of the Act is designed to prevent.

17. We are therefore satisfied, that on the evidence before the Board, Economy and Flair constitute one employer for purposes of the *Labour Relations Act*. We are also satisfied that there is no cogent reason to not so declare.

18. Section 1(4) and 64 are not necessarily mutually exclusive in their operation or effect. In appropriate circumstances, both may apply. In this case, the associated or related businesses of Economy and Flair were not active at the same time. Further, the applicant has requested that the Board remain seized with respect to remedial consequences other than declaratory relief. Accordingly, and because the effects of a successful section 1(4) application will not always be identical to the effects of a successful section 64 application, we find it necessary to deal with the latter as well.

19. For purposes of section 64 of the Act, a sale of business includes *any* disposition of *any* part of a business. A sale of business for labour relations purposes can be quite different from a sale of business in the judicial commercial sense. Like section 1(4), section 64 is intended to preserve bargaining rights along a business continuum and many of the comments we have already made with respect to the applicability of section 1(4) apply equally to section 64. A business is a dynamic combination of human initiative and physical assets. It is the human quality which gives a sense of life to a business and which separates it from a collection of assets. Bargaining rights attach to a business as an economic force or organization, not merely to employees, equipment or work performed. As the Board observed in *Gallant Painting*, [1991] OLRB Rep. Sept. 1051 in that respect:

44. A "business" is the totality of the undertaking. A "business" may include such tangible assets as tools, equipment, machinery, physical buildings together with such less tangible assets as skilled management and operating personnel and intangibles such as goodwill (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193). A "business" must be distinguished from the work performed or carried out by the business. This is particularly true in circumstances such as the present which involve a business which obtains its work by being the successful bidder on contracts which are regularly sent out for tender (either public tender or invited tender).

20. Frid was the key human dynamic force in Economy and is now in Flair. He is clearly a "key man" within the meaning of that term in the Board's successor employer jurisprudence. The movement of a key man will not always have labour relations consequences. Whether or not such consequences follow depends on the circumstances. In this case, the question is whether there has been any disposition such that Flair is, for labour relations purposes, continuing with any part of Economy's business.

21. Frid declined to purchase back Economy as a "going concern". This decision made business sense since it was undoubtedly apparent to him, as it is to us, that he could, as indeed he

did, pick up Economy's "business" without paying for it. Frid could pick up the equipment he required at distress sale prices, and Economy's business premises were ready made and available for his purposes. That, together with his experience and previous association with Economy enabled Frid, through the vehicle of Flair, to, in effect, pick up where Economy had left off; that is, to continue Economy's business. The speed with which Economy foundered after Frid departed demonstrates his importance to the business. In effect, Frid was Economy. Now Frid is Flair. As we have already noted, Flair operates in the same commercial arena, from the same location, uses the same equipment, and deals with the same customers as did Economy. Further, although there are now others involved, it is apparent that it is Frid's knowledge and expertise which makes Flair a going concern. It is Frid, and his movement from Economy to Flair which provides a nexus between the two companies such that, as a business, Flair is Economy. It is Frid's presence in the equation which distinguishes this from a situation in which a stranger seizes a commercial opportunity to obtain some or all of another entity's market share. We are satisfied that the bargaining rights which attached to Economy should therefore also attach to Flair.

22. Accordingly, in the alternative and in addition to our finding that Economy and Flair constitute one employer for purposes of the Act, we find that there has been a sale of business from Economy to Flair within the meaning of section 64 of the Act.

23. In the result, the Board:

- (a) declares that the respondents Economy Store Fixtures Limited and Flair Woodworking Ltd. constitute one employer for purposes of the *Labour Relations Act*;
- (b) declares that the Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America holds bargaining rights for employees of Flair Woodworking Ltd. in the bargaining unit defined in the collective agreement between the member companies of the Canadian Woodwork Manufacturers Association and Carpenters and Allied Workers, Local 27 - United Brotherhood of Carpenters and Joiners of America;
- (c) declares that there has been a sale of a business from Economy Store Fixtures Limited to Flair Woodworking Ltd.

24. The Board shall remain seized, for a period of ninety days from the date hereof, with this matter, for the purpose of dealing with any difficulties with the implementation of this decision and with any other remedial consequences which the parties are unable to resolve between themselves.

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**0093-92-FA UFCW Local 175, Applicant v. 888538 Ontario Limited o/a Holiday Inn, Owen Sound, Respondent**

**First Contract Arbitration - Board making award on items in dispute, including wages, signing bonus, banquet gratuities and term of agreement**

**BEFORE:** Ken Petryshen, Vice-Chair, and Board Members J. A. Rundle and E. G. Theobald.

**APPEARANCES:** Michael A. Church, Jack Colvin and Michael Pledger for the applicant; Raja Chopra and Kulwant Chopra for the respondent.

**DECISION OF THE BOARD; May 20, 1992**

1. This is an application filed pursuant to section 41(4) [formerly 40a(4)] of the *Labour Relations Act* arising out of a request of the parties that the Board arbitrate the settlement of the first collective agreement.

2. The applicant was certified on May 16, 1991 to represent full-time and part-time bargaining units of employees of the respondent's full service hotel at Owen Sound. In the spring of 1992, the applicant filed an application for a direction that a first collective agreement be settled by arbitration. After spending considerable time with a Labour Relations Officer, the parties settled the language issues but were unable to resolve certain monetary issues. By written agreement dated April 7, 1992 the parties agreed to the Board directing their dispute to arbitration and acting as arbitrator. By the time the hearing commenced, the issues in dispute between the parties were as follows:

- (1) Wages
- (2) Signing Bonus
- (3) Banquet Gratuities
- (4) Term of Agreement.

3. We do not intend to extensively review the authorities which refer to the Board's approach when arbitrating a first collective agreement. The general approach of the Board is set out in *Egan Visual Inc.*, [1986] OLRB Rep. Dec. 1687, at paragraph 3 which provides as follows:

3. It would be unwise for the Board to attempt to definitively set forth the contents of a collective agreement which are applicable to all circumstances. As more first contract arbitrations are filed with the Board, no doubt criteria will arise as a result of experience in a greater number of situations. There are no statutory guidelines in the Act which require the Board to have regard to a given standard of comparison. The Board would, however, adopt the language set forth in *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Oct. 1327. In that case the Board indicated that it had adopted a somewhat similar approach to the reasoning of the British Columbia Labour Relations Board in *London Drugs Ltd.*, [1974] Can. LRBR 140 at page 147. The Board agrees that applications under section 40a [now 41] of the Act with respect to a first contract arbitration by the Board should not be used to achieve major breakthroughs in collective bargaining, but rather, the Board would try to settle the terms of a collective agreement which reflect a fairly general consensus as to what should be the contents of a collective agreement having regard to the particular circumstances of each collective bargaining situation. The Board also agrees that the terms of the collective agreement should be sufficiently attractive to the employees who are in the bargaining unit defined in the collective agreement that they

would give serious consideration before deciding to terminate the bargaining rights of the applicant.

4. In deciding how to resolve the issues in dispute, the Board has considered the material before it and the representations of the parties. In particular, we have recognized the impact of the recession on the hotel industry in general and on the respondent in particular. We have also taken into account that the employees in the two bargaining units are paid the minimum wage or slightly above and that the applicant has been certified for almost a year and has been unable to secure a collective agreement.

#### Term of Agreement

5. The applicant seeks a two-year term while the respondent wants a three-year collective agreement. Having regard to section 41(18) of the Act, this collective agreement shall be for a period of two years from the date of this decision.

#### Wages

6. In its final position, the applicant seeks an 80¢ hourly increase across the Board in the first year and a 40¢ hourly increase in the second year. The respondent's final position consists of a grid which provides for an increase every three months culminating in a 50¢ hourly increase once an employee obtains twelve months of service. In the second year, the increases in the grid would apply again. In other words, over two years the union seeks an increase of \$1.20 an hour and the employer has offered \$1.00 an hour increase over two years for a person who has been employed for one year.

7. In our view, a grid approach is not uncommon in a service industry of the type we have here. Over a two-year period, the parties are not that far apart. Our award with respect to wages is as follows:

For the first year of the agreement effective the date of this decision:

Those persons employed	0-3 months	- no increase
	3-6 months	- 25¢ an hour
	6-12 months	- 45¢ an hour
	12 months or more	- 60¢ an hour

For the second year of the agreement:

Those persons employed	0-3 months	- no increase
	3-6 months	- 15¢ an hour
	6-12 months	- 35¢ an hour
	Over 12 months	- 50¢ an hour.

#### Signing Bonus

8. The applicant is seeking a signing bonus of \$150.00 with no deductions for all full-time employees and a \$100.00 signing bonus for all part-time employees. The respondent agrees to pay a \$150.00 signing bonus to all employees with one year's seniority or more. It agrees to pay \$100.00 to all full-time employees with less than one year's seniority and will pay \$50.00 to all part-time employees with less than one year's seniority. There are 10 full-time employees, 5 of whom have been employed longer than one year. Only one of the 13 part-time employees has been employed for more than one year.

9. Our award with respect to the signing bonus is as follows:

\$150.00 for all full-time employees

\$ 80.00 for all part-time employees.

The above amounts are to be paid to those employees in the bargaining units as of the date of this decision and within 45 days of the date of this decision, provided the employee commenced work prior to March 1, 1992.

#### Banquet Gratuities

10. The real issue in dispute between the parties is whether porters in addition to servers will be entitled to \$2.00 per hour in addition to their regular wage rate for duties in connection with functions. Since a porter's normal duties include setting up and dismantling functions and since porters would not normally be expected to receive a gratuity, as opposed to servers, our award is that porters shall not be included in the provision dealing with gratuities.

11. On the basis of what we have awarded above, the Board expects that the parties will have no difficulty with framing their collective agreement. The Board will remain seized to deal with any problems arising from the implementation of this award.

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### **2893-91-R Labourers' International Union of North America, Applicant v. Hurley Corporation, Respondent v. Group of Employees**

**Certification - Construction Industry - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board concluding that petition involuntary viewing petitioners' evidence in the best light, from the petitioners' perspective - Certificate issuing**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *W. H. Wightman* and *D. A. Patterson*.

**APPEARANCES:** *Bernard Fishbein*, *Michael Klug* and *John Cruz* for the applicant; *Scott Thompson*, *J. Michael Horgan* and *Jim C. Long* for the respondent; *Paul Jewell*, *Q.C.* and *Steve Homen* on February 10, March 4, 12 and 16, 1992; *Steve Homen* for the objectors on April 13, 22 and 30, 1992.

#### **DECISION OF THE BOARD; May 13, 1992**

1. This is an application for certification.

2. The parties first met with a Labour Relations Officer and were able to reach agreement on a number of matters in dispute between them.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.



4. Having regard to the agreement of the parties, the Board further finds that all employees of Hurley Corporation at the Trillium Terminal 3 complex at the Lester B Pearson International Airport in the City of Mississauga, save and except non-working supervisors and persons above the rank of non-working supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. On the basis of the membership evidence filed, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on December 13, 1991, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. Although this level of membership support would ordinarily be sufficient for the Board to automatically certify the union, there were also filed with the Board "petitions" or "statements of desire", signed by employees, indicating opposition to the certification of the applicant. The number of those employees signing the petition, who had also signed membership cards on which the union relies, was sufficient so that the Board would not automatically certify the union, if it were to be satisfied that the petition represented the voluntary expression of the employees so signing it, but rather, the Board would then direct a representation vote be held.

7. Although there were additional issues before the Board, including the reliance of the applicant on the provisions of section 8 of the Act, it was agreed that the Board first consider the allegations filed by the employee objectors asserting improprieties in the collection of the memberships by the applicant union, and then consider the issue of whether the petition was voluntary.

8. The applicant union asserted that the allegations filed by the employee objectors, asserting improper behaviour in the collection of some of the union memberships, failed to disclose a *prima facie* case. The union submitted that those allegations ought to be dismissed on that basis. After entertaining the submissions of the parties, the Board orally ruled, with reasons provided at the hearing, that the allegations did not disclose a *prima facie* case. Accordingly, the allegations of the employee objectors, insofar as they asserted a breach of section 70 of the *Labour Relations Act* by the applicant, were dismissed at the hearing.

9. Over five further hearing days, the Board heard the evidence of the employee objectors with respect to the voluntariness of the petition they had filed. At the conclusion of their evidence, the employer indicated it had no evidence to call, at that stage, on the issue of the voluntariness of the petition. At that point, the applicant union in effect made a motion for a non-suit, arguing that the petitioners, based on all their evidence, had failed to establish a *prima facie* case for the voluntariness of the petition, and that the petition ought to be found to be involuntary without the case proceeding further. The applicant submitted that it not be put to its election before being able to make the non-suit motion; specifically, it argued that it not be required to indicate to the Board whether it intended to call any evidence, should its motion be unsuccessful, prior to being allowed to argue the motion on its merits. After hearing the submissions of the party on this issue, the Board ruled that the applicant would not be required to make an election as to whether it wished to call any evidence, should the hearing proceed, and that it could proceed to make its motion for non-suit without so electing. Our reasons for this ruling will issue at a later date.

10. After entertaining the submissions of all the parties on the motion for non-suit, the Board ruled orally at the hearing as follows:

Based on the evidence, in all the circumstances, the Board is unanimously of the view that the

petition is involuntary. We have reached this conclusion viewing the evidence led by the petitioners in the best light, from the petitioners' perspective. It is nevertheless clear that the petition is not voluntary.

The petition was started by the fianc 2i of the daughter of a manager of the respondent company, who was actively assisted in the circulation of the petition by the wife of another manager of the respondent. Numerous employees were requested by their forelady, at the workplace while they were working their shifts, to go during their breaks to sign the petition. Although this forelady did not in fact exercise managerial duties within the meaning of section 1(3)(b) of the *Labour Relations Act*, she was still a forelady who would be perceived as a forelady by the employees under her control. Further, these actions arose in a context where the employees had already been told directly by their employer, the respondent company, through the publication of Exhibit 6, a notice to all employees, that their employer was opposed to the union, and they had a legal right to actively oppose a union organizing attempt.

In these circumstances, the Board is satisfied that the petition could not be voluntary.

The message employees would have taken, in all these circumstances, would be that their employer was both opposed to the union and that their employer favoured their signing the petition opposing the union. Whether this was true or not (that is, whether the employer wanted employees to oppose the union and whether the employer was actively sending that message), the fact remains that the employees would clearly have been under this impression.

In these circumstances, the petition is clearly involuntary.

Accordingly, the motion is granted.

11. In the result, the Board is not prepared to give any weight to the petition as an indicator of the wishes of those who signed the petition and also signed membership cards. As the union has filed a sufficient level of membership support to warrant certification without the holding of a representation vote, a certificate will issue forthwith to the applicant.

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**0499-92-T Re: International Association of Bridge, Structural and Ornamental Iron Workers, Applicant and International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union 834, Toronto, Ontario, Respondent**

**Practice and Procedure - Trusteeship - Board receiving April 1992 letter from General Secretary of International Union stating that local placed under trusteeship in April 1991 - Board treating letter as request under s. 84(2) of the Act to extend terms of trusteeship - Board directing International Union to bring its request to the attention of Local members - Members to have six weeks to advise Board in writing whether or not they oppose International's request**

**BEFORE:** R. O. MacDowell, Alternate Chair, and Board Members W. N. Fraser and C. A. Balentine.

**DECISION OF THE BOARD;** May 22, 1992

1. Section 84 [formerly 82] of the *Labour Relations Act* reads as follows:

**84.** (1) A provincial, national or international trade union that assumes supervision or control

over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.

2. The *Labour Relations Act* recognizes that a “parent” union will occasionally consider it necessary to suspend the autonomy of one of its “locals” of trusteeship. However, the statute requires that the Board be notified of such trusteeship *within sixty days* of its imposition, and such trusteeship cannot continue beyond twelve months from the date of its imposition without the express consent of the Board.

3. There are public policy reasons for these statutory requirements. In the first place, the Legislature has struck a balance between the rights of the parent organization to run its own affairs and the rights of the local union members to control theirs. A local union is still a “union” within the meaning of the *Labour Relations Act* whatever its connection to an international parent may be; and as a “union” in this jurisdiction it has a variety of rights and responsibilities. Among those is the duty to fairly represent employees in any bargaining unit represented by that union, whether or not such employees are members of the local. Similarly, the local may have *statutory* responsibilities in respect of area hiring hall arrangements, adherence to the provincial collective agreement, and so on. A trusteeship is not just an internal union affair, for when the parent assumes control it may also assume any ongoing legal responsibilities.

4. And the statute is clear that a trusteeship cannot extend beyond a year without the consent of the Board.

5. By letter dated April 27, 1992, received by the Board May 13, 1992, the General Secretary of the International Association of Bridge, Structural and Ornamental Iron Workers advised the Board that *effective April 1, 1991* the International Association assumed control of Local 834. The letter goes on to state that the Local remains under International supervision as of today’s date [April 27, 1992]. Attached to this letter is a Form 6, Statement of Trusteeship which indicates, *inter alia*, that the International Union is unable to determine the period of time during which supervision or control is to be exercised.

6. The problem, of course, is that the International did not advise the Board of this trusteeship within sixty days of its imposition, and by the time it got around to advising the Board about it, the legally permitted limit for such trusteeship had already expired. The International has not only failed to comply with its statutory obligations, but now seeks to do what the statute prohibits without the express consent of the Board.

7. In the circumstances, the Board is prepared to treat this material as a request for an extension of the term of supervision made pursuant to section 84(2) [formerly 82(2)]. But the Board is not prepared to do that, without soliciting the representations of persons potentially affected by this Board decision (see generally *International Chemical Workers Union v. Canadian Chemical Workers Union Local 28*, [1978] OLRB Rep. June 499 and *Anthony Frank Amos et al. v. Operative Plasterers’ of the U.S.A. and Canada et al.*, [1978] OLRB Rep. March 223 and 227.)



8. Having regard to the foregoing, the Board directs the applicant union to take such steps as are necessary to bring its request to the attention of the members of Local 834 who will be affected by it. At a minimum, such members must receive a copy of the request, together with a copy of this decision. The International Union is also directed to advise the Board, in writing, of the steps it has taken to bring this matter to their attention.

9. MEMBERS OF LOCAL 834 OF THE INTERNATIONAL UNION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS WHO RECEIVE A COPY OF THIS DECISION WILL HAVE UNTIL JULY 15, 1992 TO ADVISE THE BOARD, IN WRITING, WHETHER OR NOT THEY OPPOSE THE INTERNATIONAL UNION'S REQUEST FOR AN EXTENSION OF ITS TRUSTEESHIP OVER LOCAL 834. MEMBERS OF LOCAL 834 WHO OPPOSE THE INTERNATIONAL'S REQUEST MUST ALSO SPECIFY, IN WRITING, THEIR REASONS FOR DOING SO.

10. After July 15, 1992 the Board will take such steps as appear to be warranted on the basis of the material then before it.

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**3401-90-R Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Jarrett Commercial Contracting Ltd. and Jarrett Construction Ltd., Respondents**

**Construction Industry - Related Employer - Remedies - Parties agreeing that legal requirements for single employer declaration present - Whether, in view of conduct of employees or union's business representative, Board should exercise its discretion to issue declaration - Board making section 1(4) declaration, but limiting its effect to those commercial activities or contracts entered into after receipt of section 1(4) application**

**BEFORE:** *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

**APPEARANCES:** *David McKee* and *M. Yorke* for the applicant; *Arthur Tarasuk* and *E. Jarrett* for the respondents.

**DECISION OF THE BOARD;** May 25, 1992

I

1. This is an application filed pursuant to sections 1(4) and 64 [formerly section 63] of the *Labour Relations Act* ("the Act"). The application was filed on March 21, 1991. Several grievances filed by the applicant union ("the Carpenters" or "the union") against the respondent Jarrett Commercial Contracting Ltd. ("JCCL") which have been referred to the Board pursuant to section 126 of the Act underlie this application. Upon agreement of the parties the grievances referred to the Board for arbitration have been adjourned pending the ultimate disposition of this application.

2. The Carpenters' application for a declaration that there has been a sale of the business from JCCL to Jarrett Construction Ltd. ("JCL") pursuant to section 64 of the Act was not pursued

before this panel. Having regard to the evidence before us that portion of the application is hereby dismissed. Accordingly, the only matter which will be addressed in this decision is the Carpenters' application that the respondents constitute one employer for purposes of the Act.

3. The respondents agree, and based on that agreement and the evidence before us, we find that the respondents carry on related activities or businesses under common control or direction. The only issue which remains is whether or not the Board ought to exercise its discretion under section 1(4) of the Act and declare that the respondents constitute one employer for purposes of the Act.

4. We heard the evidence of four witnesses over the course of seven days of hearing. In addition, voluminous amounts of documentary material was placed in evidence before us. Based on that *viva voce* and documentary evidence we find the following facts to be relevant.

5. JCL was originally incorporated in March 1980. Its president, sole director and sole shareholder is E. R. Jarrett. Although initially involved in the renovation and redevelopment of residential premises bought for land speculation purposes, the company soon entered the commercial renovations market of the construction industry. The general economic recession of the early 1980's however resulted in little growth for the company. Although Mr. Jarrett continued to pursue business opportunities the company did not flourish. As the recession ended, JCL's fortunes started to improve and by early 1985 the corporation was again engaged in a limited number of construction activities.

6. In 1984 however Mr. Jarrett had formed a partnership with two other persons and incorporated a company known as Jarrett Commercial Contracting Ltd. ("JCCL"). The partnership did not last long and soon only Mr. Jarrett remained as the president, sole director and sole shareholder of JCCL. JCCL was also engaged in the commercial renovations market of the construction industry.

7. For a period of time Mr. Jarrett directed all his efforts into the growth of JCCL. JCL did not undertake any construction projects in 1984. By early 1985 however, and after the dissolution of his partnership Mr. Jarrett commenced to operate both JCCL and JCL simultaneously in the commercial sector of the construction industry.

8. Both companies are engaged primarily in the interior finishing, renovation and remodelling of stores and offices. At all relevant times the two companies have been operated by Mr. Jarrett as separate and distinct legal entities and from a financial perspective in an arms length fashion. Each company maintains its own separate financial records, payrolls, bank accounts, cheques etc. Whenever employees of one company perform services on behalf of the other company, the costs for such services together with a fixed percentage to cover overhead and profit is charged to the other company in the same manner as work subcontracted to any other unrelated third party corporate entity.

9. On May 29th, 1985 Mr. Jarrett on behalf of JCCL entered into a voluntary recognition agreement with the Carpenters' Union. Mr. Jarrett's stated reason for entering into that agreement was to ensure that JCCL had a source for the skilled labour it required from time to time, and to provide JCCL with the capability of meeting the requirements of its clients who required that union labour be used on a job. This voluntary recognition agreement obliged JCCL to recognize the Carpenters' Union as the exclusive bargaining agent of all carpenters and carpenters' apprentices engaged in the industrial, commercial and institutional sector (ICI sector) of the construction industry in the Province of Ontario. It also bound JCCL to the Carpenters provincial collective

agreement pertaining to the ICI sector. As part of that voluntary recognition agreement Mr. Jarrett signed an acknowledgement or “confirmation” stating:

The employer confirms that the employer does not operate or control other companies engaged in work coming within the scope of the carpenters’ provincial collective agreement in the Province of Ontario on the date hereof.

The acknowledgement also indicates that M. Reasbeck was an employee working for JCCL who performed work described in the recognition clause of the recognition agreement.

10. It was Mr. Jarrett’s evidence that on May 29th, 1985 JCL was not actively “engaged in work”. Mr. Jarrett read the clause in its “literal sense” and felt that, as JCL was not “engaged in work” on May 29th, 1985 he could in good conscience sign the confirmation. JCL had been engaged in a construction project in the previous month as a result of a contract entered into on April 16th, 1985, and was again engaged in construction activity immediately following the signing of the voluntary recognition agreement as a result of contracts entered into on May 31st, 1985, June 7th, 1985 and others thereafter. Mr. Jarrett however did not consider that he was obliged to disclose or discuss the existence or activities of JCL when he signed the agreement as a result of this “confirmation”. He stated in his evidence that the union “didn’t ask” about JCL. That entity and its activities were therefore not discussed.

11. Since 1985 the non-union JCL has operated alongside the unionized JCCL. Mr. Jarrett testified that whenever a job was a “non-union” job, JCL would be the general contractor on the job. JCL entered into the contract with the owner/client and was responsible for arranging labour for that job either through the direct hire of employees or through the subcontract to other entities including JCCL. If the job was a “union” job, JCCL held the general contract, was responsible for the job, and for arranging labour and entering into subcontracts. Mr. Jarrett defined a “union” job as those jobs where the owner/client required that unionized persons be employed. Conversely, in the absence of a specific requirement by the owner/client that the work force consist of union members, the job was deemed to be “non-union”. In these latter instances “business” considerations dictated which persons or entity JCL would employ or engage to perform the work. Based on these definitions there were only a few “union” projects over the years and many non-union projects. Indeed, since 1988 the only substantial “union” projects have been those which were done for the Royal Bank of Canada at 20 King Street West in Toronto.

12. The fact that the contract was held by JCL and the project was therefore considered to be “non-union” however had little if anything to do with whether the persons employed at the site were union members or not. Over the past several years JCCL has developed as the entity which supplies labour to JCL for its “non-union” jobs. Typically JCL obtains the construction contract. JCL will then subcontract all or a portion of the work to JCCL. JCCL then supplies its labour to the site. Persons supplied to the project by JCCL are paid by JCCL in accordance with the terms of the carpenters’ agreement to which JCCL is bound. Dues and other remittances are made to the union by JCCL on behalf of such persons. There is no evidence to suggest that JCCL has ever subcontracted its labour to any entity other than JCL. JCCL has, on occasion acted as a general contractor and engaged its own unionized carpenter employees on the project. Over the past several years the instances in which JCCL acted as a general contractor however have been rare. As a result, and over the years the majority of carpentry labour on the projects of *both* companies has consisted of union members who were employees of JCCL. There have however been various instances where all or some of the carpenter labour on projects where JCL was the general contractor was comprised of direct hire employees or subcontractors with no union affiliation.



## II

The Employees

13. The manner in which the two entities conducted their business led to the type of situations which section 1(4) is intended and designed to guard against. Thus, for example, there were instances where non-union employees of JCL worked alongside union employees of JCCL on the same project. Employees of JCL would be paid by JCL. Employees of JCCL were remunerated in accordance with the collective agreement by JCCL.

14. In addition the evidence discloses situations in which persons employed upon the same construction project were initially employed and paid by JCL but during the term of the project changed their employment status, became employees of JCCL and were then paid by JCCL. The reverse situations in which persons originally employed by JCCL pursuant to the terms of the collective agreement changed their employment status while engaged on the project and became employees of or individual subcontractors to JCL also occurred. Similarly, there were instances when persons would be working for both JCL and JCCL during the same pay period. In those cases the persons would receive two separate pay cheques for the hours of work performed on behalf of each of the two companies. Wages paid by JCCL were in accordance with the Carpenters' collective agreement. In addition, vacation pay, dues and other remittances were made to the union by JCCL. On the other hand, wages paid to the employees by JCL equaled the hourly rate set out in the Carpenters' collective agreement together with the vacation pay provided for in that collective agreement. The percentage for vacation pay was paid directly to the employee and no dues or remittances were made to the union by JCL. The amount or manner in which employees were paid, or the company from which they received their pay had little to do with which corporate entity held the general contract for the project.

15. The circumstances in which the same persons would alternatively be employed by both JCL and JCCL in the same pay period occurred primarily in 1987, 1988 and 1989. There is no evidence to suggest this type of overlap in the payroll records of the two companies since January 1990. Similarly there is no evidence to suggest that the individual "switching" of employment status during the course of a particular project which occurred in the early years during which the two companies operated simultaneously continued in 1990 or thereafter. It would seem that since 1990 the two companies have maintained separate work forces, although the two work forces may still be employed simultaneously to work upon the same project.

16. At various times members of Local 27 have worked for both JCL and JCCL on a non-union (JCL) and union (JCCL) basis. The frequency of these occurrences and the reasons which prompted the occurrences varied in the years from 1985 to 1989. There is no evidence to suggest that since late 1989 union members have performed work covered by the collective agreement on a non-union basis for JCL as opposed to working as union members employed by JCCL.

Mac Reasbeck

17. In 1984 and until September 1985 Mac Reasbeck, the employee referred to in the voluntary recognition agreement signed by Mr. Jarrett in May 1985 worked exclusively for JCCL. In September, October and November 1985 Mac Reasbeck was primarily employed by JCCL although for one week in each of those months Mr. Reasbeck was also employed and paid by JCL on an office renovation called "Kubas Research" (a project upon which JCL held the contract and which Mr. Jarrett therefore considered to be "non-union"). The bulk of pay received by Mr. Reasbeck during these three months however came from JCCL as a result of Mr. Reasbeck's work upon a commercial project called "Rennis Needle Craft (White Oaks)". From December 1985 to

July 1986 however, and with the exception of a five hundred dollar "bonus" paid to Mr. Reasbeck by the unionized JCCL, Mr. Reasbeck was exclusively employed and paid by JCL for his work upon three separate commercial projects, all of which were construction contracts held by JCL (an office renovation for architects Page and Steel, an office renovation at 22 St. Joseph Street and the Hockley Valley Ski Resort (HVSr)). In July and August 1986 Mr. Reasbeck continued to work at the HVSr project but during those months he was remunerated by JCCL in accordance with the terms of the collective agreement. Dues and remittances on his behalf were made to Local 27. Thereafter Mr. Reasbeck was never again on the JCCL payroll.

18. In September 1986 and until he stopped working for JCL in December 1987 Mr. Reasbeck was paid exclusively by JCL for his work upon projects where JCL held the contract. During that time however Mr. Reasbeck was not paid as an "employee" of JCL, rather he was engaged and remunerated as an independent "subcontractor" known as EM-AR Services by JCL. Thus, for example, although Mr. Reasbeck had previously worked upon the HVSr project as a non-union employee of JCL, then worked upon the same project as a unionized employee of JCCL, in September 1986 and thereafter he was engaged upon the same project as an independent contractor. At all times Mr. Reasbeck was performing the same type of carpentry work notwithstanding his apparent change in status vis-a-vis the respondents. There is no evidence to indicate whether Mr. Reasbeck made his own contributions or remittances to the union when engaged as an independent contractor by JCL.

19. JCL has also engaged the services of other individual non-union subcontractors who at other times may have been employees of JCL. Thus for example Mr. Dooley may have worked for JCL either as an employee or through his company called Thistlewood Interiors. Mr. A. Coady may have worked for JCL either as an employee or through his company Ambrose Coady Carpentry. The same is true for Mr. McPherson and Mr. Penny. Unlike Mr. Reasbeck however there is no evidence to suggest that these individuals were also employed by JCCL at different times. (Mr. McPherson did perform some minor residential work in April 1987 for JCCL). There is also no credible evidence as to whether these individuals were members of Local 27.

20. In addition to Mr. Reasbeck there are three other employees of JCCL who were members of Local 27 and who worked for JCL on a non-union basis from time to time. They were K. Yarrow, B. Henry and D. Charron. The circumstances under which this occurred requires some elaboration.

#### K. Yarrow

21. During the last week in December 1987 Mr. Yarrow received pay cheques from both JCL and JCCL. With the exception of this one week however Mr. Yarrow was an employee of JCCL and was paid exclusively by JCCL throughout 1987.

22. Mr. Yarrow was also primarily employed and paid by JCCL in accordance with the collective agreement during 1988. For a brief period in March 1988 however and again in June 1988 he was paid by both JCL and JCCL. (We note that although exhibit #6 suggested Mr. Yarrow received separate cheques from both JCL and JCCL during certain weeks of July, August and September 1988, the subsequent exhibits 10(e) and 31 do not support this).

23. In and around June 1988 the Carpenters' Union was engaged in a lawful strike. At the time of the strike JCCL was engaged as a subcontractor to JCL on a number of projects for which JCL held the contract. As a subcontractor JCCL used its unionized work force to perform the work. Mr. Yarrow and a Mr. B. Barnes were both members of that unionized work force working at projects within Local 27's jurisdiction. As JCCL was unable to complete its subcontract because



of the strike, JCL terminated the subcontract and completed the work itself. Persons who had been employed by JCCL on those sites obtained employment with JCL and continued to work on those projects on a “non-union” basis. When the strike was settled however Mr. Yarrow returned to employment with JCCL and once again continued working on the projects as a unionized employee of JCCL. Mr. Barnes also returned to his employment with JCCL (although he may have been laid off from time to time) and continued to work as a union member with JCCL until the termination of his employment after the summer of 1989.

24. The 1988 strike was the only time Mr. Barnes worked for JCL on a non-union basis. At all other times Mr. Barnes was employed by JCCL in accordance with the terms of the collective agreement. With the exception of the strike and two brief periods in March 1988 and again in the last two weeks of August 1989 Mr. Yarrow also worked exclusively as a union member for the unionized JCCL.

25. Mr. Yarrow’s reasons for switching employment from JCCL to JCL in March 1988 was to enable him to receive his vacation pay from the union. Mr. Yarrow approached the office manager for the respondents and advised that the union only paid out vacation pay once a year and would not give him his vacation pay then when he wanted it. However, if he could be put on the JCL payroll for a short period of time it would appear as if his employment with JCCL had been terminated thereby entitling him to receive vacation pay immediately. The office manager discussed the matter with Mr. Jarrett. As Mr. Yarrow was working on a “non-union” job at the time, that is to say a job where the contract was held by JCL, Mr. Jarrett approved the temporary transfer of Mr. Yarrow from the JCCL payroll to the JCL payroll. After two weeks as a JCL employee on the JCL payroll Mr. Yarrow returned to employment with JCCL and was again placed on the JCCL payroll.

26. During the last two weeks of August 1989 Mr. Yarrow again received pay cheques from both JCL and JCCL for work performed upon ICI projects although the reason for that was not explained by any witness. We note that during those two weeks Mr. Yarrow worked 76 and 63.5 hours on projects at Hazelton Lanes. Having regard to the evidence we draw the inference that Mr. Yarrow’s time on that project was merely allocated in almost equal proportions to each of the two companies. On the evidence before us however we can find no similar explanation why Mr. Yarrow received a cheque for \$793.29 from JCL on March 7th, 1989 or why he received monthly cheques of \$285.00 on the 14th, 15th or 16th of every month from JCL. Mr. Yarrow did not work for either JCL or JCCL in 1990.

#### B. Henry

27. During the last week of October 1987 B. Henry received a pay cheque from both JCL and JCCL. The evidence discloses that the monies paid by JCL to Mr. Henry was with respect to work in connection with a Page and Steel job. At other times Mr. Henry was paid by JCCL in connection with work on that same project. During the months of May, June, July, November and December 1987 Mr. Henry was an employee of JCL and was paid exclusively by JCL. In August, September and October however he was an employee of JCCL and, with the exception of the last week of October he was paid exclusively by JCL.

28. In 1988 Mr. Henry continued to work for and be paid by both JCL and JCCL. For the vast majority of that time he was an employee of JCL remunerated by JCL. Originally Mr. Jarrett’s testimony indicated that there were five separate instances in March, April and June where Mr. Henry received a pay cheque from both JCL and JCCL in the same week (see exhibit #6). Subsequent exhibits (exhibit #11(d) and exhibit #31) indicate however that Mr. Jarrett’s evidence in this regard was in error as the cheques he referred to as being issued by JCCL to B. Henry on



specific dates in March, April and June in 1988 were actually issued on those dates in those months in 1989. The evidence discloses and we find that from January to September 1988 Mr. Henry was an employee of JCL and was paid exclusively by JCL. In September, October and November, 1988 however Mr. Henry was an employee of and paid by both JCL and JCCL often receiving a separate pay cheque from both companies for work performed during the work week.

29. Although Mr. Henry was paid by both JCL and JCCL during the latter part of 1988, in January and the early part of February 1989 Mr. Henry was paid exclusively by JCL. Thereafter and until the end of 1989 Mr. Henry was paid exclusively by JCCL. (Receiving only minor differing amounts for expenses, parking etc. from JCL from time to time). The only exception was the last two weeks of August 1989. Like Mr. Yarrow Mr. Barnes was engaged at the Hazelton Lanes project during those two weeks and worked 76 and 52.5 hours during those weeks receiving pay cheques from both JCL and JCCL during that period.

30. Mr. Henry also performed some work for JCCL in February 1990 and then again in September, October and November 1990. During those periods of time however it would appear that he was exclusively on the JCCL payroll.

31. Mr. Henry's employment pattern came about because from time to time Mr. Henry requested of the office manager or Mr. Jarrett that he be placed on the JCCL payroll in order to ensure that his dues, pension and benefits remittances to the union did not fall in arrears. Alternatively he would request work on a non-union basis for JCL in order that his weekly take home pay was greater as dues and benefit deductions were not made from the pay cheques he received from JCL.

32. Two other union members who worked for both JCCL and JCL and who on occasion were paid by both companies during the same work week were Silas Visneskie and Danny Charron. Mr. Charron commenced work for JCL at a time when he was not a member of any union. He worked non-union for JCL from January to mid-August of 1989. During the course of his employment he joined Local 27 and requested that he work only for JCCL on a union basis. Within a matter of weeks however he returned to the office manager and requested to go back to work non-union for JCL because, with deductions for dues, benefits and vacation pay his take home pay had decreased. Mr. Jarrett agreed that Mr. Charron could return to work on the non-union jobs on which JCL held the contract. Thereafter, at various times in October, November and December 1989 Mr. Charron received pay cheques from both JCL and JCCL. In 1990 Mr. Charron worked and was paid for only a brief period of time by JCL and received no money from JCCL.

33. We heard little evidence about the reasons which prompted Mr. Visneskie to work for both companies. The payroll records disclose however that he also commenced work with the non-union JCL but during August 1989 commenced working for and being paid by JCCL. During the remainder of 1989 he received only three pay cheques from JCL and was paid primarily by JCCL. In 1990 however Mr. Visneskie was not employed by JCCL. He returned to the JCL payroll and was employed and paid by JCL exclusively until the termination of his employment in June of that year.

34. Mr. Jarrett testified that JCL continued to employ members of Local 27 in 1991 although such persons were employed in a supervisory capacity and on a salaried basis. These individuals were therefore responsible for making their own remittances to the union.

## III

The Conversation

35. This leads us then to the conversation between Mr. Ball and Mr. Jarrett in August 1986 and its effect on this application. Mr. Ball and Mr. Jarrett both testified and offered different versions of the content and their understanding of that conversation. In our view their different recollections had more to do with their perspective as to what each communicated and intended to communicate to the other at the time rather than any attempt to mislead the Board.

36. Having regard to the totality of the evidence we find that on August 22, 1986 Mr. Karl Ball approached Mr. Jarrett at the HVSR site. Mr. Ball was at all relevant times the business representative of Local 785 of the Carpenters' Union. That local's geographic jurisdiction included Kitchener and the Hockley Valley area. Mr. Ball and Mr. Jarrett had spoken via telephone on July 28, 1986 when Mr. Jarrett had called Local 785 requesting that union members be dispatched to a JCCL construction site, namely the Grand and Toy store at the Eaton Centre in Kitchener. Mr. Jarrett considered that to be a "union" project.

37. From conversations with union members Mr. Ball became aware that Mr. Jarrett had obtained a construction contract at the HVSR. He attended at the site. While there he noticed a number of carpenters who were not members of his local and advised Mr. Jarrett that Mr. Jarrett had to obtain carpenters through Local 785's hiring hall and not from the Toronto local. There was some talk about the provisions of the collective agreement including the ratio whereby a contractor may transfer employees who are union members from one geographic area (i.e. Toronto - Local 27) to a project in another geographic area (i.e. Hockley Valley - Local 785). Mr. Ball expressed his opinion that unless union members were employed in a supervisory capacity, carpentry work had to be performed by union members referred from his local in accordance with the collective agreement provisions (including those ratios relating to the use of members from another local).

38. Mr. Jarrett replied that the HVSR project was a non-union job because the contract for the project was held by JCL and not JCCL. It was his position to Mr. Ball that therefore there was no obligation to comply with any terms of any collective agreement. Mr. Jarrett stated that only JCCL was unionized. However, because additional carpenters were required on site Mr. Jarrett told Mr. Ball that he was prepared to hire carpenters from Local 785 through JCCL.

39. Mr. Ball was not aware that there was another corporate entity. He told Mr. Jarrett that fact was irrelevant. He advised Mr. Jarrett that he couldn't operate both a union and a non-union company. Reference to the single employer provisions of the Act may have been made. In turn Mr. Jarrett told Mr. Ball that both companies had been in existence for some time and had operated in this manner and he intended to continue to do so on that site. In simple and somewhat crude language Mr. Ball told Mr. Jarrett that he didn't accept that explanation. He told Mr. Jarrett "it was bull shit" and that as far as he, Mr. Ball, was concerned Mr. Jarrett was a union contractor required to hire union members and otherwise comply with the collective agreement. From Mr. Ball's point of view the different names Mr. Jarrett wanted to use for different legal entities didn't change the fact that Mr. Jarrett was bound to recognize the Carpenters' Union.

40. The conversation did not progress much beyond that - Mr. Jarrett insisting he was under no obligation to hire any union members but indicating he was prepared to do so through JCCL because he needed men, and Mr. Ball insisting that all carpenters on site be union members referred through his local.

41. Mr. Ball subsequently returned to his office and dispatched a number of Local 785



members to the HVSR site. These union members continued to work on the job (alongside members of Local 27) until they were laid off in December. A union steward was appointed. Mr. Ball was not aware of any further violations of the collective agreement after his visit to the site in August. Indeed, he knew that the drywall subcontractor on site was also a unionized contractor. This fact indicated to him that the collective agreement was being observed. From his perspective therefore any problems had been resolved as the project was now being run as a union project, with members of his local on site and in compliance with the collective agreement. In his view Mr. Jarrett had abandoned his position that he could operate non-union by agreeing to hire and subsequently hiring members dispatched by the local union. Mr. Ball testified that he would not have referred men to the HVSR site if he thought or accepted that the project was a non-union project run by a non-union company.

42. Mr. Jarrett on the other hand felt that he had told the union representative that he was operating and intended to continue to operate his non-union business. He felt that he and Mr. Ball had established a mutually satisfactory working relationship. Mr. Jarrett needed additional manpower. Mr. Ball had unemployed members who wanted work. JCCL was prepared to hire those persons and perform the work on a subcontracted basis for JCL. Mr. Jarrett testified that as a result of what he considered to be the understanding reached with Mr. Ball he continued to hire non-union carpenters through JCL. It was his recollection that there may have been one non-union carpenter on the HVSR site even after Mr. Ball's visit. (Mac Reasbeck was also at this time being paid by JCL either as an employee or as an independent contractor for his work at the HVSR site.)

43. There are two additional matters arising from this conversation which must be noted. First, Mr. Jarrett testified that after a period of transition and as the business arrangements between the two corporations became more organized he changed his way of conducting the businesses as a result of his understanding of the effect of the conversation with Mr. Ball. Mr. Jarrett testified that because in his view the union was aware and had accepted his operation of the union and non-union company, he no longer "needed to operate simultaneously and so [JCCL] became no more than a supplier of labour". He testified that JCCL "got out of the general contracting business and got into the subcontracting business" as a result.

44. Secondly, Mr. Ball testified that had Mr. Jarrett not hired union members and in all other ways complied with the collective agreement obligations to which Mr. Ball considered him bound after their conversation he would have initiated the necessary legal proceedings before the Board. However, as all work on the project was performed in accordance with the collective agreement he did not consider it necessary or appropriate to file either a grievance or a single employer declaration at that time.

#### IV

##### Submissions

45. The respondents assert that in the circumstances of this case we ought not to exercise our discretion in favour of the union. It is submitted that the respondents have operated openly and simultaneously as both a union contractor (in the case of JCCL) and a non-union contractor (in the case of JCL) for several years. Moreover the union has been aware since at least 1986 that JCL was a related corporation which operated in a non-union fashion. Through its conduct the union acknowledged and condoned this state of affairs. As a result of these circumstances the union is precluded at this late stage from seeking relief under section 1(4). The respondents rely chiefly upon the Board's decision in *Andreynolds Company Limited*, [1990] OLRB Rep. Nov. 1107 and submit that the present facts are indistinguishable from the facts in that case.



46. The respondents submit that notwithstanding any “mischief” the declaration ought not to be granted because the Carpenters’ Union knew that Mr. Jarrett operated a union and a non-union company but chose for a significant period of time to do nothing about that fact. The respondents argue that at the very least as a result of the conversation between Mr. Jarrett and Karl Ball, the Carpenters’ Union has known since August 1986 of the existence and operations of these two separate companies. Its delay in filing this application has prejudiced the respondents in a manner which now precludes the union from obtaining the single employer declaration it seeks.

47. Counsel for the respondents submits that as a result of this conversation the union knew Mr. Jarrett was operating two companies, one of which he considered to be non-union. Mr. Jarrett was honest and up-front and did not misrepresent his activities or his intentions to Mr. Ball. Notwithstanding this knowledge the union did nothing. Rather, Mr. Ball simply took the position that he didn’t agree with or accept what Mr. Jarrett had told him. He did not however take the matter any further. He didn’t investigate. He didn’t file a grievance or a single employer application with the Board. Neither did he disclose the information he had been given by Mr. Jarrett to the other locals of the Carpenters’ Union and advise those locals to monitor the activities of the companies to ensure compliance with the collective agreement.

48. It was argued that Mr. Ball’s cavalier response to the situation was to be contrasted with the response of Mr. Yorke, another business agent. When Mr. Yorke first became suspicious of the activities of the respondents, he conducted a corporate search. He continued to monitor the respondents’ construction sites and eventually filed the grievances and this single employer declaration. While Mr. Yorke’s conduct met the “due diligence” test, Mr. Ball’s conduct and attitude fell far short of it. Counsel submitted that the Board ought not to endorse Mr. Ball’s arrogant conduct by finding that it meets the Board’s accepted standards of due diligence especially when the rights and status of others are affected by that conduct.

49. Counsel pointed to the manner in which Mr. Jarrett operated his businesses after his conversation with Mr. Ball as evidence of the prejudice suffered by the respondents. He argued that Mr. Jarrett relied upon Mr. Ball’s statements and conduct. He equated those with a representation or an inducement that the simultaneous operation of the union and non-union company would be permitted by the union. In so doing he relied upon *Andreynolds Company Limited*, *supra*.

50. The respondents refer also to the fact that it has openly carried out its activities with the knowledge and approval of its employees who are members of the union. This factor, together with the use of distinct and separate signs on sites, cheques etc. also points to union knowledge and highlights the fact that there has been no subterfuge, scheme or sham by the respondents.

51. For its part the Carpenters deny that it was aware of the situation, or that by its conduct it has acknowledged and condoned the double breasting which has occurred. The union asserts that once it became aware of facts which raised a potential threat to its bargaining rights and/or work opportunities it acted promptly in pursuing a remedy under section 1(4). The union referred to *KNK Limited*, [1991] OLRB Rep. Feb. 209; *B & M Millwork Ltd.*, [1991] OLRB Rep. Apr. 438; *The Great Atlantic & Pacific Company of Canada Limited*, [1981] OLRB Rep. Mar. 285; *E.S. Fox Limited*, [1991] OLRB Rep. July 819; *The John Hayman & Sons Company Limited*, [1984] OLRB Rep. June 822 and *Newman Bros. Limited*, [1981] OLRB Rep. June 750.

52. Counsel for the union submitted that the conversation between Mr. Ball and Mr. Jarrett is not in the circumstances of this case sufficient to impute actual knowledge to the union. At best the conversation may have raised some suspicions. However, when considered in context Mr. Ball said and did all he had to. He advised Mr. Jarrett he didn’t accept his explanation, he immediately

referred Local 785 union members to the site, and he ensured that the provisions of the collective agreement were met. In light of Mr. Jarrett's hiring of those union members and his compliance with the collective agreement Mr. Ball could quite properly conclude that Mr. Jarrett had tried to raise but eventually abandoned the position that he could operate non-union. Moreover, since the collective agreement was being complied with and Local 875 members were on site there was no need for Mr. Ball to either file a grievance or initiate legal proceedings before the Board. Mr. Jarrett's bald assertion that he could operate non-union was no longer relevant as there was no erosion of bargaining rights and no loss of job opportunities. A single employer application made at that time may well have been dismissed by the Board as being premature (see for example the *John Hayman and Sons Company Limited*, [1984] OLRB Rep. June 822).

53. Counsel for the union further submits that in the circumstances there is no evidence to suggest that the union has been wilfully blind or has abandoned its bargaining rights. He asserted that even if it is determined that the union knew or should have acted at an earlier stage the respondents have not suffered any prejudice as a result of the union's conduct. Counsel referred to Mr. Jarrett's testimony that it was always his intention to "get back to using" JCL and submitted that Mr. Ball's conduct or comments did not change that. Further, the practical effect of the conversation on Mr. Jarrett's "change" or approach to his businesses was at best minimal. The only real change that occurred was that eventually all construction contracts were signed by JCL rather than JCCL. The day-to-day operations of the two companies however or the method in which work on the construction projects was performed (i.e. primarily by union members through sub-contracts for labour to JCCL) remained basically unchanged.

54. Counsel for the union submitted that there was no evidence before the Board about the wishes, rights or expectations of the employees who worked or who may wish to continue to work non-union for JCL. The Board need therefore not be unduly concerned with considering those rights or expectations. Moreover, over the years many of the "non-union" JCL employees have in fact been members of Local 27 and the Board should not condone the making of "deals" between employees represented by a trade union and an employer which allow those employees to ignore the obligations of union membership (i.e. by working through a strike) while reaping the rewards of union membership. With respect to those employees of JCL who are not and have never been members of the Carpenters' Union counsel referred to the decision of the Board in *KNK*, *supra* (see paragraphs 36 to 46).

## V

### Decision

55. We note at the outset that there is no evidence to suggest that the union had any knowledge about the existence or activities of JCL at the time it entered into the voluntary recognition agreement with JCCL. In these circumstances, and in light of the confirmation signed by Mr. Jarrett we are of the view that those decisions of the Board in which the Board has refused to exercise its discretion and grant declaratory relief under section 1(4) because it viewed the application as an attempt to "sweep in" a pre-existing non-union operation do not apply. (See, for example, *Mandic Bros. Drywall and Const. Ltd.*, [1982] OLRB Rep. May 693; *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. Mar. 308 and *Gerald Davidson Plumbing & Heating Limited*, [1984] OLRB Rep. Mar. 462).

56. We have assumed that Mr. Jarrett genuinely believed that because JCL was not engaged in work on May 29th, 1985 it was not necessary to disclose or discuss its existence with the union. In our view, however, the language of the confirmation signed by Mr. Jarrett goes much further than this subjective belief. Viewed objectively the confirmation clearly indicates an interest



by the union to attempt to ascertain the existence of pre-existing and related corporate entities whose presence and activities may affect or impact upon the bargaining rights which the union acquired through the voluntary recognition agreement. Given the express wording of the confirmation, its clear intent and in the absence of any evidence that the union knew about the pre-existing non-union corporate entity and had either expressly or tacitly approved of its continued non-union status we decline to dismiss the application merely because JCL had been in business for several years before the union obtained its bargaining rights for JCCL.

57. In our view the evidence in this case highlights the very concerns or “mischief” to which section 1(4) is directed - namely concern about the viability of the bargaining rights of the union and the preservation of a viable bargaining structure. Two related entities with ostensibly separate work forces carry on an essentially integrated operation within the interior finishing segment of the ICI sector of the construction industry.

58. We accept that the respondents have openly carried out their activities with the knowledge and indeed the approval of the employees who are union members. The operation of the two companies was freely and candidly discussed with and amongst employees.

59. We agree that there is no suggestion in any of the evidence before us that Mr. Jarrett sought to camouflage the activities of his non-union company. The issue to be resolved however is whether the facts and circumstances and the open employee interchange between the two companies point to union knowledge and union delay in filing this application. In the circumstances of this case we think not.

60. Although the facts disclose that either all or a significant number of the employees of both companies knew of the simultaneous operation of a non-union and union company, there is nothing in this evidence to suggest the union knew and acquiesced in this state of affairs. Indeed, logic dictates that the employee union members who did know and who were active participants in the operation of the non-union company would not be inclined to divulge that information to union officials.

61. The reasons which prompted some employees to work for both the union and non-union company were all founded on self-interest. An opportunity to work during the strike, a chance to immediately receive vacation pay, a possibility to work extra hours without the “restraints” (upon employer and employee alike) of the collective agreement, the realization of more weekly cash in pocket while maintaining the benefits of union membership, or the economic and tax advantages associated with being an “independent subcontractor” rather than an “employee” all motivated employees to participate through their employment in the operation of the non-union company. This economic self-interest of the employees however is inconsistent with some of the responsibilities imposed on the employees by reason of their union membership. Thus for example most trade unions including the Carpenters’ Union do not typically permit or encourage employees to work during a strike for a non-union company which is completing work previously performed by a struck union company. Similarly, union members are typically prohibited from working outside the parameters of the collective agreement for employers otherwise bound to the collective agreement. In our view we can take “judicial notice” of the fact that the constitutions and rules of membership for most unions contain rules for the conduct of its member and penalties for conduct such as this which is inconsistent with membership in the union.

62. A trade union acts through its officers, agents and officials. For purposes of the requirement that the union had knowledge of the circumstances which gave rise to a single employer operation, it is the knowledge of those officers, agents and officials which is relevant. In the absence of any evidence to suggest that the knowledge of the individual union members was communicated by



those members to the union's officers, agents or officials, we are not prepared to impute that knowledge to those union representatives.

63. In this case the circumstances under which union members worked for both the union JCCL and the non-union JCL have been sporadic and generally for very brief periods of time. Mr. Barnes and Mr. Yarrow worked non-union only for a matter of weeks. Mr. Charron was essentially an employee who, after "trying" union membership for a while determined to return to his non-union status. The same holds true for Mr. Visneskie. Only Mr. Reasbeck and Mr. Henry engaged in a more consistent and concentrated effort which essentially allowed them to have their cake and eat it too. Once Mr. Reasbeck determined to work as an independent subcontractor however he did not again work as a unionized employee for JCCL.

64. Given the relatively infrequent and short periods of time during which the overlaps took place, (and it had not occurred for some time preceding this application) we do not consider this to be a situation where the union knew or ought to have known of the activities of its members and tacitly approved of those activities. The union was not a party to the individual arrangements which some of its members made with the respondents.

65. Having said that we wish to note our concurrence with the observations of the Board in *KNK Limited*, [1991] OLRB Rep. Feb. 209 where at paragraph 57 the Board stated:

Where the union's inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights the Board may well dismiss the application.

66. The union is responsible for ensuring that the collective agreement is enforced and adhered to by the employer. It is also responsible however for ensuring that its own members enforce and abide by that collective agreement and the union constitution and rules which govern members. The appointment of an on-site steward is one method by which a union can ensure that the conduct of its members complies with the collective agreement and the union constitution. A trade union which consistently fails to ensure that its own members are also "playing by the rules" (to put the matter colloquially) runs the risk of a finding that it has abandoned its right to represent those employees or that it has consented to the existence of the non-union company for the benefit of the employees it represents. The "policy reasons ... rooted in labour relations ... consideration" may be different in circumstances where the Board is faced with balancing the competing interest of the employer, employee union members who have shown a propensity for wanting to keep their options open and a union which has through its conduct permitted that state of affairs to exist for a significant period of time. (See *KNK*, *supra*, at paragraph 57).

67. Counsel for the respondents in his submissions emphasized that the actions of the respondents in permitting persons to work for either JCL or JCCL was at the employees' request and as a result of employee wishes. It was not by the design or subterfuge of Mr. Jarrett whose actions throughout have been open and above board. Any "scheme" or subterfuge was on the part of the employees. In this sense Mr. Jarrett is an "innocent" employer. We refer to paragraph 33 of *KNK*, *supra*, where the Board stated:

It is important to note that section 1(4) is not an unfair labour practice provision. Although some commercial dealings which trigger section 1(4) may constitute an unfair labour practice, section 1(4) itself does not require a finding of "anti-union animus". It is not limited to commercial "schemes" designed to escape from the union. It can also apply to *bona fide* business transactions which only incidentally frustrate established statutory rights. Section 1(4) is not a "penalty" provision. It merely allows the Board to consider such business transactions from a labour relations perspective rather than common or commercial law rules.

68. In the circumstances of this case the fact that Mr. Jarrett may not have engaged in a scheme to defeat the union's bargaining rights has little relevance. In this instance where the union was not aware and did not consent to any such scheme, we can see no policy reasons why the union should be prejudiced as a result of the isolated actions or individual wishes of a few of its members. In other circumstances however and in the exercise of its discretion the Board may view the "innocence" of the employer as a more relevant consideration where it is the union and/or its members which have engaged in a scheme to the prejudice of the employer.

69. In the absence of communication from its members are there other circumstances which point to union knowledge and delay in the facts as they relate to the work patterns and preferences of the employees? Again we think not.

70. We find that generally the construction activities of both JCL and JCCL consisted of projects requiring only a small crew. The interior finishing or renovations of commercial outlets, offices and retail shops within shopping centres, malls or office buildings on which small crews consisting of one, two or three persons worked would not necessarily attract the attention of the union's business agents responsible for policing the administration of the collective agreement. This is particularly so in this instance where the "non-union" employees on site were generally members of the Carpenters' Union who, by their own choice were working on a non-union basis. A business agent confronted by such a situation would merely see individuals known or identified to be union members working on site. Without the added information that these persons were being paid in a manner contrary to the collective agreement by an ostensibly non-union entity and that no remittances on their behalf were being made these circumstances would not attract knowledge or even suspicion. That added information although available to the respondent is not readily available to the union. We do not agree that receipt of the remittance forms in or about the 20th of the month following the month in which an employee worked provides the union with that knowledge.

71. We also note that a number of the times during which union members or others worked on a non-union basis as either employees of JCL or subcontractors to JCL occurred on projects outside the Metropolitan Toronto area or Local 27's geographic jurisdiction. Work on some of those out of town projects was performed by only one person.

72. When working outside Local 27's geographic jurisdiction JCL often employed a "Local 27 member" either alone or in conjunction with a labour subcontract to JCCL. JCCL would in turn use local carpenters obtained from the local hiring hall. JCCL would send all the appropriate remittances to the local union. Assuming that the local business agent visited the site s/he would thus see local union carpenters and, provided that the "local/outside of local" ratios in the collective agreement were observed would not be concerned that a Local 27 carpenter was working within the local's geographic jurisdiction. Moreover, the local business agent who received remittance sheets with respect to that local's members would not be aware of the fact that remittances for other union members on site were not made to that members home local.

73. We view the use of signs at the sites to be neutral. We have in evidence two photographs of signs. One states "Jarrett Construction". The other refers to Jarrett Construction Limited as the general contractor on site, but also refers to "Jarrett Construction - Management". In both the name Jarrett is predominant with the reference to both construction and construction - management in smaller letters underneath. In light of the predominance of the Jarrett name, the similarities in name between the respondents, and the use of union carpenters on site we do not view the signage as a factor from which the union could have known of the non-union nature of JCL.



74. As to the conversation between Mr. Ball and Mr. Jarrett and the respondents' reliance upon the decision in *Andreynolds Company Limited, supra*, we view the facts and circumstances of this case as distinguishable from those in *Andreynolds Company Limited, supra*. There the Board found that the union had actual knowledge, failed to act *and* failed to put the related companies on notice that it objected to having the non-union company perform work covered by the collective agreement in violation of that collective agreement. At paragraph 53 of that decision the Board noted "there is no evidence that ... anyone from the union contacted Bill Bailey/Andreynolds to express the union's concern about what had occurred. The union took no steps to put the employer on notice that it viewed the situation as one to which section 1(4) applied or could be applied".

75. That is not the case before us. Assuming that Mr. Ball had actual knowledge of the facts necessary to file a section 1(4) application as a result of his conversation with Mr. Jarrett, the evidence discloses that Mr. Ball immediately notified Mr. Jarrett that this state of affairs was not acceptable to the union and that he considered the operation to be a single employer bound to recognize the union. The single employer concept was clearly communicated by Mr. Ball to Mr. Jarrett in a manner which conveyed to Mr. Jarrett that the union did not accept or condone Mr. Jarrett's use of a non-union entity to perform bargaining unit work.

76. In *Andreynolds Company Limited, supra*, the union attempted to resolve the issues surrounding one company's use of non-union labour by taking into membership the non-union apprentice plumber employed by that company. The Board noted:

53. Mr. Christie provided a very practical reason for not filing a section 1(4) declaration at that time. He attempted to deal with the problem without litigation by having Scott Maracle join the union and thus having him become an employee of Andreynolds. Mr. Christie's common sense approach to the problem is commendable. That common sense approach or informal resolution of the *immediate problem* however, was not sufficient because the union took no steps to put the companies on notice that it objected to Bill Bailey performing plumbing work in a non-union manner. There is no evidence that after Scott Maracle's membership in the union and transference to the Andreynolds' payroll anyone from the union contacted Bill Bailey/Andreynolds to express the union's concern about what had occurred. The union took no steps to put the employer on notice that it viewed the situation as one to which section 1(4) applied or could be applied.

54. We agree with the U.A.'s assertion that it is preferable to resolve problems without litigation. We are also of the view that in these circumstances it is not necessarily incumbent upon the union to file a section 1(4) application. The parties are encouraged to continue to settle these types of labour relations matters through discussion, compromise and other non-litigious means.

55. In this instance, however there was no true resolution of the "problem" because the respondents were not put on notice by the U.A. that the union viewed the co-existence of Bill Bailey/Andreynolds and the fact that Bill Bailey did plumbing work non-union as a "problem". The "problem" was solved from the U.A.'s perspective only. The respondents remained unaware that there was any problem. Indeed, the opposite conclusion could be reached. The union's silence conveyed the message that there was no problem and that Bill Bailey could continue to employ non-union plumbers as it had with Scott Maracle and as it had throughout the 1970's.

56. In our view, at a minimum and short of filing a section 1(4) application at that time, the union could have and should have put Bill Bailey on notice that it viewed anything other than a sub-contracting of the plumbing work acquired by Bill Bailey back to Andreynolds as a dilution of its bargaining rights. It did not do so. Instead, Bill Bailey was allowed to continue to grow and develop notwithstanding the union's current contention that Bill Bailey's operations dilute or undermine its bargaining rights and job opportunities.

77. Similarly, in this instance Mr. Ball attempted to avoid the costly and time consuming litigation of filing grievances and applications under section 1(4) by immediately ensuring union



members were dispatched to the site and by making sure that the project was performed in accordance with the terms of the collective agreement. In addition, however, he put the company on notice of the union's position. Unlike the union's silence in *Andreynolds*, Mr. Ball's conduct did not convey the message that there was no problem. There is nothing in the evidence to suggest the union acquiesced to Mr. Jarrett's position. The evidence is to the contrary. Mr. Ball insisted union members perform the work on the project and referred those members to that project.

78. Was Mr. Ball required to file a grievance or a single employer declaration? In this case the answer to that question must be no.

79. After his visit and his referral of Local 785 members to the site Mr. Ball knew that there was no erosion of bargaining rights and that the work covered by the collective agreement was being performed by union members in accordance with the collective agreement. In our view the trade union was not required to engage in costly, time consuming litigation (perhaps running the risk of a finding that its section 1(4) application was premature) to obtain a declaration which at that time and in all of the circumstances would be superfluous and unnecessary to protect its rights and the rights of its members.

80. To hold otherwise would impose litigation upon parties when other non-litigious, common sense resolutions of the problems are equally effective. A union would be *required* to file a single employer declaration (and employers would be forced to respond to such applications) even though there was no erosion of bargaining rights and no lost work opportunities or run the risk of the Board later finding that the union's failure to litigate is evidence of acquiescence or condonation. Requiring litigation rather than the resolution of issues through compromise and other non-litigious means does not promote harmonious labour relations between parties.

81. In our view the situation before us is more analogous to that found in *Krest Masonry* where the Board concluded:

35. The evidence before us establishes that the union was aware of Canada Contracting as early as June of 1986 when it became actively involved in residential projects and the union was conducting a strike. Union business agents approached Mr. DeRose to complain about his presence on construction sites, warning that he would not "get way with it" although little or no effort was made to organize the "non-union" bricklayers working on those sites. Thereafter, there were discussions between the union and various members of MCAT, but no section 1(4) application was made. In other words, the union was well aware, two years ago, that Canada Contracting presented a potential threat to its bargaining rights/work opportunities but chose not to pursue the remedy clearly open to it. Canada Contracting was allowed to develop and grow despite the union's current contention that it was merely a device to develop a non-union arm through the use of subcontractors. Business developed and flourished, contracts were entered into and completed, and relationships were established and terminated, while the union grumbled and complained but made no concrete effort to assert what it now claims are its statutory rights. It is understandable and indeed commendable that the union would seek an informal resolution of its concerns without resort to litigation, but there is also something to be said for the proposition that one should move promptly to assert one's statutory rights under section 1(4).

82. Although we have determined that neither the conduct of the employees nor that of Mr. Ball warrants a dismissal of this application, we are of the view that such conduct is not entirely neutral in balancing the interests of the parties.

83. In *KNK, supra*, the Board noted:

57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy

reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very “mischief” upon which the union relies and for which section 1(4) is a remedy. The argument becomes entirely circular. A union’s undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will *not* know) may be a factor to be considered in exercising the Board’s discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union’s inaction actually contributed to that prejudice. Where the union’s inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights, the Board may well dismiss the application. However, where the balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration or granting such other relief “as it may deem appropriate”, the Board should consider that option, rather than dismissing the application altogether.

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59. The union was actively asserting its members’ rights against Agincourt in the weeks preceding KNK’s incorporation, and Mike Lloyd’s unsuccessful investigation two years later had precisely the same objective. Had he filed a 1(4) application in 1987, there is little doubt that it would have been granted, and without any limitation. But he did not, and as a result Mr. Harvey carried on business as before, enjoying whatever benefits can be attributed to relief from the collective agreement. On the other hand, if no declaration is made, the Board will be ratifying an effective termination of bargaining rights - not upon application to the Board or even based upon the wishes of employees properly in the bargaining unit, but rather because Mr. Harvey created a new legal vehicle and it took some time for the trade union to respond. That response was certainly tardy - based, it seems, on ignorance of both the facts and the legal remedies available to it; however, it does not follow that there should be no declaration at all.

84. In this case we cannot conclude that either the union or its members “actively” asserted their rights. There was little evidence before us about the union’s “policing” of its bargaining rights. Such evidence as we have is not very satisfactory. For example, Mr. Ball did not provide any reasonable explanation why he didn’t advise the other business representatives of the local of his conversation with Mr. Jarrett so that they could monitor and follow up on the situation when JCCL and/or JCL obtained work within their geographic jurisdiction. There is no evidence that the union exercised its rights under the collective agreement to appoint a union steward on job sites to assist the union in ensuring that contractors and union members alike complied with the collective agreement. Prior to Mr. Yorke’s attendance upon certain sites which eventually prompted the filing of this application, there is no evidence the union ever exercised its collective agreement right to access all jobs or projects. We can’t condone the activities of those employees who are union members but for various reasons chose at different times to work non-union.

85. Having considered the evidence and competing considerations in this case, we are satisfied that the appropriate balance of labour relations interests can be fairly struck by making the section 1(4) declaration which the union seeks, but limiting its effects to those commercial activities or contracts entered into by JCL after receipt of notice of this section 1(4) application. When the union filed this section 1(4) application, Mr. Jarrett was put on notice that, thereafter, the dealings of JCL might be affected by the collective agreement. We do not think that, in all the circumstances, a section 1(4) declaration should have retrospective effect.

#### **CONCURRING OPINION OF BOARD MEMBER C. A. BALLENTINE; May 25, 1992**

1. I cannot agree that Mr. Jarrett was somehow an innocent employer as stated by the majority decision at paragraph 68. I do not believe the scheme which undermined the interest of the other union members of Carpenters and Allied Workers Local 27 was devised solely by the union members employed by Jarrett Construction Ltd. (JCL).



2. Mr. Jarrett approached the union on May 29, 1985 with the intent to enter into a recognition agreement and thereby bind Jarrett Commercial Contracting Ltd. (JCCL) to the province-wide collective agreement. His stated reason was that he wished to have a ready source of skilled labour and to gain eligibility to tender for projects where the owner/client stipulated that union labour must be employed. Concurrently Mr. Jarrett signed a confirmation stating that he did not operate or control any other companies engaged in work coming under the jurisdiction of the union's Provincial Collective Agreement. He signed notwithstanding that he actively operated JCL as recently as the previous month and as soon as two days after signing the confirmation. Mr. Jarrett is a sophisticated businessman. I find his explanation that he understood the confirmation to be read literally as meaning the actual date of signing to be disingenuous at best or at worst, and I believe more likely, a lie. It is obvious from the evidence that the scheme was devised by Mr. Jarrett for gaining the benefits of the agreement in terms of having access to skilled labour and to certain bidding processes, but with the concomitant intention of cheating the union pension and welfare benefit plans as well as avoiding the dues check-off.

3. In the construction industry most if not all benefit plans are on an hour bank system which in all cases is less than the mandatory number of hours an employee could work in a month. The employees were allowed by Mr. Jarrett to move from the payroll of the union company to the payroll of the non-union company. It is obvious that they remained on the union company payroll long enough to satisfy and stay in good standing in the dues structure and pension and welfare benefit plans. Both Mr. Jarrett and the unscrupulous carpenters benefited from this arrangement.

4. In 1988 all the union carpenters worked for Jarrett Construction Ltd. as non-union employees during a legal strike, contrary to section 150 of the *Labour Relations Act*. Mr. Jarrett cannot be considered innocent when he aided and abetted in a scheme that is unlawful. There is no doubt in my mind that the union is entitled to a section 1(4) declaration because the scheme that was devised is exactly the type of mischief that the Legislature intended section 1(4) to correct.

5. Having said that I must also say something about the union's failure to adequately monitor and enforce its collective agreement. If the union has been dilatory in any way it is because they did not have a shop steward appointed on the Jarrett projects. I applaud the vice-chair for her comments in paragraph 66 which I believe are worth repeating.

The union is responsible for ensuring that the collective agreement is enforced and adhered to by the employer. It is also responsible however for ensuring that its own members enforce and abide by that collective agreement and the union constitution and rules which govern members. The appointment of an on-site steward is one method by which a union can ensure that the conduct of its members complies with the collective agreement and the union constitution. A trade union which consistently fails to ensure that its own members are also "playing by the rules" (to put the matter colloquially) runs the risk of a finding that it has abandoned its right to represent those employees or that it has consented to the existence of the non-union company for the benefit of the employees it represents. The "policy reasons ... rooted in labour relations ... consideration" may be different in circumstances where the Board is faced with balancing the competing interest of the employer, employee union members who have shown a propensity for wanting to keep their options open and a union which has through its conduct permitted that state of affairs to exist for a significant period of time.

6. Unfortunately construction unions don't generally rely on education and the promotion of shop stewards as industrial unions do. If the union is to enforce the collective agreement in the best interest of *all* its members, it is absolutely necessary for the union to have on-site representation. No amount of paid union business agents can effectively police the collective agreement without competent on-site representation. Over the thirteen years I have been at the Board I have wit-



nessed a number of cases where litigation could have been avoided if there had been a competent on-site shop steward.

7. There is no doubt in my mind that the union has a responsibility not only to police its collective agreement with the employer but also to discipline its own members to ensure they abide by the by-laws and the collective agreement of the union.

8. I therefore concur completely with paragraph 85 that this declaration by the Board should only become effective on the date the union filed its application - March 21, 1991.

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**3899-91-R Paul McConachie, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527, Respondent v. Ken Acton Plumbing & Heating Inc., Intervener**

**Bargaining Unit - Construction Industry - Termination - Applicant and supporting employees not members of the union and not hired through the hiring hall - Whether employees bringing the termination application entitled to support and bring the application - Board regarding reasoning in *April Waterproofing* decision applicable - Application dismissed**

**BEFORE:** Susan Tacon, Vice-Chair, and Board Members *W. N. Fraser* and *E. G. Theobald*.

**APPEARANCES:** *L. P. Merritt* for the applicant; *N. Meikle*, *J. Porter* and *T. Crystal* for the respondent; *S. Bernofsky*, *K. Acton* and *G. Acton* for the intervener.

**DECISION OF THE BOARD;** May 4, 1992

1. This is an application seeking termination of bargaining rights in which the parties reached agreement on a number of matters.

2. The application is in respect of the ICI sector of the construction industry. It was not in dispute that this application is timely. It should be noted that the applicant initially sought termination of the respondent's bargaining rights with respect to the non-ICI sectors as well. However, the parties acknowledged such an application would be untimely under the *Labour Relations Act* and, accordingly, the application was amended to pertain solely to the following bargaining unit:

all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ken Acton Plumbing & Heating Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and accept non-working foreman and persons above the rank of non-working foreman.

3. There was no issue as to the voluntariness of the petition filed in support of the termination application. The parties agreed that five persons on schedules A and B filed by the employer were all performing construction work in the ICI sector on the date of application. There is also no issue that the application is supported by at least forty-five percent of "employees" in the bargaining unit, the minimum percentage required under the Act for the Board to direct a representation vote to test the continued support for the respondent as bargaining agent.

4. What is in dispute, and the reason for the quotation marks around the word “employees” in the previous paragraph, is whether the individuals supporting the application and the applicant himself are persons entitled to support and bring such an application. The respondent asserts they are not because none of the five are members in good standing in the trade union nor were they hired through the union’s hiring hall.

5. The parties proceeded to argument on the basis of an agreed statement of facts, as set out below, plus a number of documents filed with the Board.

#### AGREED FACTS\*

\*including references to the documentary material

- (a) The union applied for certification on August 30, 1991.
- (b) On Tuesday, September 17, 1991, the union held a meeting of employees of the company at the Holiday Inn, Owen Sound. All but one of the employees of the company attended, including those who had not applied for membership in the union, as did representatives of the union. From that point onward, there was no direct communication between the union and the five employees agreed to be on schedules A and B.
- (c) On October 31, 1991, the union was certified to represent the employees of the company, as specified in paragraphs 6 and 7 of that decision (Board File No. 1846-91-R, unreported, October 31, 1991) in the ICI sector and all other sectors of the construction industry in the County of Grey and the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin.
- (d) A request for reconsideration of that certification decision was dismissed on February 20, 1992. The request was filed by counsel representing Paul McConachie (the applicant in the instant case).
- (e) The five employees on schedules A and B are not members of the union in good standing and were not hired through the hiring hall. All five were hired before the union applied for bargaining rights on behalf of the employees of the company. For purposes of this application, the length of service of the five are: P. McConachie, thirteen years; B. Kivell, twelve years; B. Loosemore, three - four years, J. Lyman, four - five years; R. Gard, from March 1991.
- (f) On November 21, 1991, five employees of the company as at the certification application date were initiated into membership in the union, namely, J. Collins, S. Dramnitzke, B. Mitchell, M. Tigert and D. Vanstone. J. Lyman had signed a membership card but was not initiated and, consequently, did not become a union member. The company was informed of the upcoming initiations by letter dated November 15, 1991.
- (g) By letter dated November 22, 1991, the union informed the company the Provincial ICI collective agreement was binding on the company and that the company’s employees must be members in good standing of the union. It is useful to set out that letter in full.

#### RE: Ken Acton Plumbing and Heating Inc.

As you will recall, we act as solicitors to the United Association, Local Union 527.

In a decision dated October 31, 1991, the Ontario Labour Relations Board certified Local Union 527 as bargaining agent for a bargaining unit of employees of Ken Acton Plumbing and Heating Inc. Pursuant to Section 145(4) of the *Labour Relations Act*, the Company became bound on that date to the Provincial Agreement between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council for construction work in the industrial,

commercial and institutional sector. This means, *inter alia*, that employees in the bargaining unit working in the I.C.I. sector must be members in good standing of the Union and that the proper wages and benefits must be paid to them.

By letter dated November 15, 1991, Mr. Jack Porter, Business Manager of Local Union 527 invited your client to meet with him at a convenient place on November 25 to discuss their contractual relationship. By letter dated November 20, 1991, Mr. Acton indicated to Mr. Porter that he could not meet until December 20 or January 17, 1992 in your offices.

We wish to impress upon you that Mr. Acton's inability to meet with our client does not absolve the company from its obligations under the collective agreement. From the date of the Board's decision, Ken Acton Plumbing and Heating Inc. has been liable for any violation of the collective agreement. The subject of a "transition period" to allow the Company to order its affairs was raised by you when we attended at the Labour Relations Board. Presumably this could have been addressed by the parties at the proposed November 25 meeting. The inordinate delay in meeting proposed by your client suggests that this is no longer a concern to him.

Mr. Porter requested a list of the jobs which the Company has under way as well as a list of future jobs secured as of October 31 as well as a list of employees (presumably bargaining unit employees). At the very least, your client should send this information to Mr. Porter immediately and arrange a telephone conference call between Mr. Acton, Mr. Porter and yourself in lieu of a personal meeting.

We must emphasize that our client will take any legal action necessary to ensure that the terms and conditions of the collective agreement are honoured by Ken Acton Plumbing and Heating Inc.

We trust that you will advise your client of this communication at your earliest convenience.

- (h) The documents indicate that, from November 1991 to March 1992, the company and the union exchanged correspondence and held discussions by telephone regarding negotiations for a non-ICI collective agreement, the issue of remittances, the application of the ICI collective agreement and related matters. On December 9, 1991, J. Porter, K. Acton, G. Acton, S. Bernofsky and N. Meikle held a telephone conference call. On January 9, 1992, there was a meeting of representatives of the union and the company with their respective counsel.
- (i) The union informed the company (through company counsel) by letter dated January 15, 1992 that R. Vanstone was appointed union steward pursuant to Article 103.1, Local 527 Appendix of the ICI agreement.
- (j) On March 3, 1992, the union filed a grievance with the company alleging violation of union's security clause in that the company was employing persons who were not members in good standing of the union and who were not cleared through the hiring hall. That grievance was referred to the Board on March 17, 1991, pursuant to section 126 [formerly section 124] of the Act. The hearing was initially scheduled for March 31, 1992 but was adjourned and rescheduled for May 26, 1992.
- (k) The instant termination application was filed March 9, 1992.

6. The submissions of counsel are next set out in highly summarized form.

7. Counsel for the union asserted that there were no employees, including the applicant, who were properly in the bargaining at the application date. The agreed facts and provisions of the collective agreement were reviewed in support of the proposition that the persons in question, since they were not members in good standing in the union and had not been hired through the hiring hall, were employed in violation of the collective agreement and, hence, could not properly bring or support the termination application. It was argued the correspondence demonstrated that the union had not abandoned the employees or the company subsequent to the certification and,



indeed, had filed a grievance against the company regarding the employment of persons not union members in good standing prior to the bringing of the termination application. To direct a representation vote in such circumstances, it was submitted, would permit the company's non-compliance with the collective agreement, whether advertent or inadvertent, to destroy the union's bargaining rights. In the alternative, counsel argued any representation vote should be deferred until the composition of the bargaining unit was in accordance with the collective agreement requirements. Cases cited in support included *April Waterproofing*, [1980] OLRB Rep. Nov. 1577; *Corecon Construction Limited*, [1987] OLRB Rep. Dec. 1480; *Culliton Brothers Limited*, [1983] OLRB Rep. March 339 ("Culliton III").

8. Counsel for the applicant asserted that section 58 [formerly section 57] of the *Labour Relations Act* specified that any "employee" in the bargaining unit may apply for termination of bargaining rights; the Act did not speak of union membership, just the concept of an "employee". It was contended that employees who were not members in good standing of the union might well be subject to discharge but, until that time, they were still employees in the bargaining unit and, therefore, entitled to bring the instant application. Counsel argued that the subsequent cases had distinguished the reasoning in *April Waterproofing*, *supra*, confining that case to the "mischief" therein where an employer sought to pad the schedule of employees in contravention of the collective agreement in order to decertify the union. That is, it was submitted that the *April Waterproofing* analysis should be confined to instances where the employer had engaged in some positive act to undermine the union and not where, as here, the persons involved in the termination application were long service employees who were hired prior to the certification application and had simply been retained subsequent to the certification of the union as bargaining agent. Counsel stressed the fact that the union had not sought to contact the employees and persuade them to become members following the union's certification as bargaining agent. In the instant case, there was no evidence the termination application was fostered by the company; it was supported by employees who simply did not want the union. It was suggested that the fact that the union had not gained support among the long service employees did not constitute "prejudice" to the union in the sense the *April Waterproofing* decision suggested. It would be bizarre for the Board to require employees opposed to the union to become members of the union in order to validly bring an application to terminate the union's bargaining rights. Counsel contended that the persons in question were never told by the union that they must join or they would lose their jobs nor was it suggested they necessarily would not join if losing their jobs was the only alternative to not becoming members. It was simply that the five were employees in the bargaining unit as required by the statute and, thus, were entitled to bring and support the termination application. Cases referred to: *Pierre A. Gratton Construction Inc.*, [1986] OLRB Rep. Jan. 137; *E. R. Masonry Ltd.*, [1988] OLRB Rep. July 668; *Ideal Railings Limited*, [1988] OLRB Rep. July 674; *Inducon Development Corporation*, [1983] OLRB Rep. July 1038; *Thomas Construction (Galt) Limited*, [1982] OLRB Rep. Nov. 1727; *Culliton III*, *supra*; *April Waterproofing*, *supra*.

9. Counsel for the company adopted the submissions of counsel for the applicant. It was submitted the company in the instant case had not acted so as to come within the parameters of *April Waterproofing*, *supra*. Rather, the company had forwarded remittances to the union in respect of its employees, whether or not union members, in accordance with the collective agreement; the remittances were subsequently returned on the basis that the union could not accept remittances from non-members. Counsel argued the union knew, as at the date of the certification application, that some long service employees were not union members but took no steps until March 1992, when the grievance was filed. It was submitted that, if the matter was a real concern, the union would have acted sooner. Whatever the outcome of the grievance between the union and the company, that should not affect the entitlement of the persons in question to bring and support the termination application.

10. The Board afforded the parties the opportunity to make written submission on the applicability, if any, of the recent decision in *F.H.R. Construction*, [1991] OLRB Rep. Aug. 977. As those submissions were in writing, the Board sees no need to reiterate them herein.

11. It is useful to begin with the oft-quoted passage from *April Waterproofing*, *supra*, wherein the Board held that persons not hired in accordance with the relevant collective agreement may not be considered employees within the bargaining unit:

8. There can be little doubt that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervenor. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen's Association v. Maritime Employers' Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

That reasoning was adopted in *Corecon Construction*, *supra*, where the Board found that certain individuals were not hired or employed in accordance with the provisions of the collective agreement and, consequently, were not employees within the bargaining unit for purposes of a termination application.

12. Subsequent decisions have referred to the “mischief” with which *April Waterproofing* was concerned, often characterized as a positive act by an employer to undermine the union’s bargaining rights, to distinguish that case from other situations where the Board has held the *April Waterproofing* rationale inapplicable. In the Board’s view, those cases may be roughly grouped under two categories: those following relatively closely on the heels of the introduction of province-wide bargaining and those wherein the conduct of the union holding bargaining rights significantly impacted upon the relevant circumstances.

13. *Culliton III*, *supra*, which falls into the first category, addressed the *April Waterproofing* analysis in this way:

22. The problem raised in *April Waterproofing* is understandably a difficult one given the transitory nature of employment in the construction industry, and the ease with which an employer’s hiring practices can alter the composition of the bargaining unit, and undermine established bargaining rights. If an employer intentionally or unintentionally fails to abide by its legal obligation to hire union members, it is relatively easy to create a situation where non-members - albeit perhaps only temporarily - will be in a position to seek termination of the union’s bargaining rights or representation by another union. Union members may be denied the opportunity for present and future employment because of the activities of individuals who should not have been hired at all. The potential for abuse, and the obvious unfairness of putting a union’s rights at risk because of the views of individuals who should not even be there, underlies the Board’s decision in *April Waterproofing*. Why should the rights of union members turn on the speed with which the union can compel enforcement of the collective agreement to eliminate non-members whom the employer has unlawfully employed? Should the union’s rights turn on whether it can require compliance with the agreement through a proceeding under section 124 more quickly than the employees whom it seeks to eliminate can file a termination application under section 57?

23. The approach in *April Waterproofing* recognizes the need to accommodate individual and institutional rights in a way which is faithful to the statutory parameters within which the Board must operate, yet is also sensitive to the requirements of labour relations policy and orderly col-



lective bargaining. No doubt similar considerations influenced the Courts in *Blouin Drywall* and *Maritime Employer's Association* which were referred to in *April Waterproofing*. In *Blouin Drywall*, the Ontario Court of Appeal held that a potential employee in a union hiring hall had certain inchoate employment rights under a collective agreement even though no common-law employment relationship existed. Similarly, in *Maritime Employers' Association*, the Supreme Court of Canada determined that a concerted refusal to refer workers from a hiring hall constituted a strike even though, again, the individuals in question were only potential employees. In both cases the Court acknowledged that common-law employment did not appropriately capture the collective bargaining reality.

24. So did the Board in *April Waterproofing*. The Board recognized that under the Act contractual rights and statutory rights are intertwined so that in some circumstances the employer's abrogation of the former could irreparably prejudice the latter. Individuals improperly hired could repudiate the statutory rights of those who should have been hired. In the Board's view, this result was inconsistent with the intended meaning of the opening words of section 7, and the statute was interpreted in that light. Of course, the Board might equally have said that it would not schedule a representation vote until the composition of the bargaining unit was in accordance with the legal requirements of the collective agreement; however, the Board considered it more appropriate and direct to treat individuals improperly hired (i.e., in the bargaining unit contrary to its contractual requirements) as not being members of the bargaining unit for the purpose of a representation application.

25. There can be little doubt that if an employer, in contravention of its contractual obligations, hires particular employees in order to foster a representation application, he will be breaching section 64 of the Act which prohibits employer interference in the formation, selection, or administration of a trade union. Indeed, where an employer has retained in its employ individuals who have illegally hired, there may well be an onus of explanation cast upon the employer to satisfy the Board that it did not continue the employment of the disputed individuals "artificially" for the purpose of influencing a potential representation application or representation vote. For example, in *Custom Aggregates*, [1978] OLRB Rep. March 215, the Board determined that a new vote should be held where an employer artificially kept certain strike replacements employed because they were likely to vote against a union in a termination application.

26. Section 89 offers one remedy for such abuses. There are others. Where the employer has fostered a raid by hiring adherents of a rival union, the Board will probably raise a "section 13" bar on the grounds that the raiding union has been the recipient of employer support. And where the employer action has resulted in a termination application, the Board may consider both its powers under section 89, and its general authority with respect to the timing, composition, and even number of required representation votes. To these express propositions, the Board adds one more by virtue of its decision in *April Waterproofing*: where the composition of the bargaining unit defined in the collective agreement is contrary to its terms because of the actions of the employer party, the Board will not consider the individuals improperly engaged to do bargaining unit work, as properly part of the unit for the purpose of a representation application. Individuals illegally hired, transferred or retained in the bargaining unit should have no more right to bring a representation application or vote in it, than they would have if they had been properly engaged in accordance with the terms of the applicable collective agreement, or if the Board had postponed a determination of their rights in a representation application until the composition of the bargaining unit is returned to what it should be.

27. The instant case, however, does not exhibit the "mischief" with which the Board was concerned in *April Waterproofing*. The employer here has not hired persons contrary to the terms of a collective agreement, improperly transferred individuals into the unit contrary to the agreement, or engaged in other activities which undermine the contractual rights of union members under the agreement by which the employer is bound. Here, the subject employees were not "hired" at all. The individuals affected were pre-existing employees who were swept into the ambit of collective bargaining by operation of law. Nor is this a case where the employer has manipulated its employee list, withheld information from the union or the Board, or sought to mislead the union with respect to its employee complement to gain the advantages of unionization, only to take a different position in a subsequent termination application. There was no positive action by the employer here which would raise any concerns or call into play the reasoning of the Board panel in *April Waterproofing*. And, given the uncertainty surrounding the



rights and status of the individuals affected by this application, we are not prepared to conclude that the fact that Culliton kept them in its employ constitutes improper interference or support which prejudices their right to seek termination of the union's bargaining rights. While there may be cases where the retention of employees, despite a challenge to their status, may warrant careful scrutiny by the Board lest the employer is "padding the list", we are not convinced that this is one of them. Nor are we satisfied that the approach in *April Waterproofing* should be adopted here.

14. The reasoning in *Culliton III* was adopted in *Inducon*, *supra*, wherein the Board distinguished between those persons hired prior to the province-wide bargaining amendments in 1980 and those hired subsequent to those amendments and after the union gave notice to the company regarding the resultant applicability of the collective agreement. The former were considered "employees" within the bargaining unit for the purposes of bringing the termination application, the latter were not. Although the decision is not entirely clear on this point, it appears that similar reasoning underlies the Board's conclusion in *Thomas Construction*, *supra*.

15. The Board has also evaluated the conduct of the union asserting the persons in dispute should not be considered "employees" in the bargaining unit for purposes of a certification or termination application. While considering the totality of the circumstances in each case, the Board has been influenced by factors such as delay by the union in questioning the propriety of the inclusion of persons in the bargaining unit, consideration of the rights of "innocent" third parties and conduct by the union which may be characterized as waiving or sleeping on its rights.

16. *Pierre A. Gratton*, *supra*, a certification application, is an example of the Board's concern with delay and the consequent emergence of third party rights:

10. The present case lies somewhere in between the situations in *Culliton* and *April Waterproofing*; as the Board ultimately found, there *has* been an extension of bargaining rights "by operation of law", but all of the employees in question were hired *after* the extension took place. And, unlike the cases of *Culliton* and *Inducon*, there was here an overt act on the part of the respondents which gave rise to that operation of law. At the same time, however, the Board, in assessing the impact of any delay on the part of the Labourers' in *this* case, has to contend with the fact of an innocent third party, the Carpenters' Union, having expended efforts to organize the employees of Grager. See *Al Smith Plastering*, [1981] OLRB Rep. Feb. 129, and the cases cited therein.

11. Obviously the potential for mischief in a situation of unlawful hiring is, as the Board has repeatedly pointed out, considerable. Accordingly, the Board, particularly with its knowledge of the construction industry, has not hesitated to presume, in the words of *Inducon*, *supra*, that the employer intended the natural consequences of his acts. That presumption is rebuttable, however, in the face of cogent evidence, and the Board on the evidence before it in the "sale" application is unanimously of the view that the principals of Grager were acting in good faith, and did in fact believe that the new, merged undertaking was not the subject of the shelved Pierre Gratton Construction Inc.'s collective agreement. We are satisfied that the principals of Grager made no effort whatever to hide the operations of "Grager" from the intervener Labourers' Union; in fact, they willingly hired individuals whom they knew to have been members of the Labourers' Union through their prior employment with "Gratton". The "Grager" company was in the field bidding on and performing jobs in the high-profile Transitway project for a substantial period of time before the Labourers', through their counsel, began to assert their claims. While the race is not simply to the swiftest, the Board can expect some measure of diligence in the unique world of construction, where unions know they must move quickly to organize or assert bargaining rights before a project is completed. Here the Carpenters' Union expended its resources in a good-faith effort to organize the apparently unrepresented employees of "Grager", and it is the decision of the Board that their application for certification is entitled to proceed, on the basis of the persons "employed" as of the date of the certification.

17. In *E. R. Masonry*, *supra*, the Board considered the *Gratton* decision and *April*

*Waterproofing* in the context where the incumbent union resisted a termination application solely on the basis that the applicant never obtained a referral slip in respect of his employment with the company. On the evidence, the union had not required referral slips be obtained by other employees of the company yet accepted the requisite remittances for those employees for a considerable period of time. The union did not take issue with the employment of the applicant nor assert he was not properly an employee in the bargaining unit until after the termination application was filed. In the circumstances, the Board found the union had waived its rights to insist on the referral slips requirement during the relevant period and with respect to the applicant's status as an employee in the bargaining unit.

18. The Board was likewise concerned with the union's conduct in *Ideal Railings, supra*. In that case, the union opposed the termination application on the grounds that the applicant was not a member in good standing because of his failure to pay union dues for quite some time. It is useful to refer to the decision itself:

6... As of the filing of this termination application, no move had been made by the trade union under Article 6.05 of the agreement to compel the employer to discharge Mr. Romero or any other "employee". It should also be noted that Mr. Romero was an employee of the intervener long before the union acquired its bargaining rights and that he was only one of a large number of employees who had failed to pay union dues. Indeed, it is conceded that at the time this application was made only a small number of the intervener's employees were paying union dues and therefore were union members "in good standing".

7. The difficulty with the union's position is that it is inconsistent with the terms of the collective agreement upon which it is purportedly based. That agreement - and in particular Article 6.05 - makes it perfectly clear that the obligation of employees with respect to union membership and the payment of dues, is distinct from "employment" in the bargaining unit. An employee who fails to comply with the obligations imposed by Article 6 may be subject to discharge, but until such discharge is actually effected s/he remains an employee in the bargaining unit defined above. The applicant and other recalcitrant dues payers continue to work for the employer, for wages, must as they did before, and they continue to meet the literal wording of the recognition clause and what it means, at law, to be an "employee". There is no suggestion here that the employer has somehow manipulated the employee complement so as to avoid its contractual obligations, nor is the employer in this case obliged to resort to the union hiring hall in order to fulfil its employee requirements. There is no evidence that the applicant or anyone else was hired contrary to the terms of the the collective agreement, and no issue of the "inchoate" rights of out-of-work union members who should have been hired if the terms of the collective agreement had been followed. At most, one has a failure by certain employees to fulfil obligations imposed upon them *personally* by the terms of the agreement, and a decision by the union not to require the discharge of such employees as contemplated by Article 6.05. The principles and the concerns expressed in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577 have no application in the circumstances of this case. We are satisfied that the applicant was an employee in the bargaining unit at the relevant time.

19. The recent decision in *F.H.R. Construction, supra*, echoes similar concerns in the following passage:

52. We do not consider the *April Waterproofing* principle to be applicable to these circumstances. The Board's jurisprudence following *April Waterproofing Ltd., supra*, has indicated that the principle enunciated in that decision has limited application. The principle is not a strict rule. It is a principle which may be applied or not applied in given circumstances having regard to the purpose of the principle. As the Board stated in *Aero Block and Precast Ltd., supra*, at page 98:

15. Thus, it may be seen that the *April Waterproofing* principle does not fit every situation in which employees may be employed in a bargaining unit contrary to the provisions of a collective agreement. The Board has been prepared, in the face of cogent evidence, to look beyond the simple fact that challenged persons were hired contrary

to a collective agreement before it decides whether to apply the principle in a particular case. Does the principle have application in the instant case?

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54. As was the case in *Culliton Brothers Limited*, *supra*, we do not view these circumstances as exhibiting the “mischief” with which the Board was concerned in *April Waterproofing Ltd.*, *supra*.

55. We do not agree that these persons should be considered as “new hires” or persons who had been hired off the street just prior to the termination application because each employee had received a notice of lay-off without a specified date of recall. In our view, here the employer simply recalled in the spring the employees in its employ who had been laid off in the winter in the same manner as it had done in the past. Indeed, the evidence shows that at least one employee (Mr. Thibault) returned to work in the spring of 1990 at the exact same project from which he had been laid off in the winter.

56. Although the failure to obtain clearance cards or contact the union hiring hall prior to the recall of the employees in the spring of 1990 was a violation of the collective agreement, in the circumstances of this case we view that violation to be a “technical” violation of a pro forma requirement which should not adversely affect the status of these employees to bring this termination application. The collective agreement acknowledges the employer’s right to recall “regular employees”. The three persons on the list meet the definition of a “regular employee” (article 3.1(b)). Although the employer recalled these “regular employees” without conforming with the procedure specified in the collective agreement, in the circumstances we do not view that procedural flaw to be fatal to the termination application.

57. We find that there was no “positive action” taken by the employer which raises the dangers which the *April Waterproofing* principle was designed to guard against. The employer merely recalled to its active employment its long service employees who had been in its employ when the union was certified in the summer of 1989, and who had continued in its employ throughout that summer without any complaint or challenge by the union. After certification in the summer of 1989 the union, although fully aware of the situation did nothing to protest the continued employment of the persons whom it now asserts are not “members of the union in good standing”. It did not for example require employees to obtain clearance cards. In these circumstances, having apparently been content with the circumstances throughout the summer and fall of 1989 as it awaited the signing of a sewer and watermain collective agreement, the trade union cannot at this stage and after the filing of the termination application be heard to complain that the situation it permitted to develop continued to exist.

58. There is no evidence to suggest F.H.R.’s actions were designed to foster a representation application. There was no artificial padding of the list, no artificial continuation of employment and no manipulation of the employee complement in order to support, foster or influence a potential termination application. F.H.R. simply continued its business in the same manner as it had done in 1989 (and previous years) when there had been neither follow up nor objection by the union. Although the *April Waterproofing* principle does not apply only to such situations, the facts and circumstances of this case are far removed from those instances where an employer deliberately hires persons who are antipathetic to the union in order to promote a termination application. In our view the employer’s failure to recall “through the union office” ought not to prejudice the rights of the employees who brought this application.

59. With respect to its relations with the employees there was also no follow up by the trade union. The union was fully aware that persons who were not in its view “members in good standing” were employed by an employer for whom it held bargaining rights. Indeed it used the applications for membership of these very persons to obtain its bargaining rights in Board Area 17. Yet the union did not take any steps to ensure that these employees had complied with those requirements which it now asserts are mandatory such as the full payment of initiation fees or the payment of monthly dues. The evidence is to the contrary. The employees were advised that the full initiation fee was normally due upon signing a collective agreement (an event which never occurred) and that dues would be deducted directly from their pay-cheques. Having indicated that it was prepared to wait for the full payment of the initiation fee or payment of dues



until the signing of the collective agreement, the union cannot now rely upon the non-payment of these fees to argue that persons otherwise employed in the bargaining unit defined in the collective agreement do not have the requisite status to bring this application.

20. In the instant case, the collective agreement requires, as a condition of employment, that employees must be members in good standing of the union and, in the Local 527 Appendix, that all employees must be hired through the union office. The relevant provisions read:

ARTICLE 12 - UNION SECURITY

12.1 As a condition of employment, an employee must be in good standing with the Union.

LOCAL 527 APPENDIX

Article 101 - HIRING

101.1 All employees shall be hired through the Union Office. The Union List of Unemployed members consisting of Plumbers, Steamfitters and Welders will be in effect.

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101.5 Should the Union be unable to supply member journeymen or apprentices, then the Contractor may hire others, who as a condition of employment shall be required to obtain clearance from the Union Office.

21. It was not disputed that the five persons in question are not members of the union in good standing nor were they hired through the hiring hall. Their continued employment is in contravention of the provisions of the collective agreement. Counsel for the applicant, with whom company counsel concurred, argued that the fact that the individuals were employees *prior* to the certification application and the company merely *retained* their services rendered the reasoning in *April Waterproofing* inapplicable. That is, there was no positive act by the employer to subvert the union's bargaining rights, for example, through padding the list or hiring employees opposed to the union. Therefore, it was asserted the persons satisfied the statutory requirement that they be "employees in the bargaining unit" in order to properly bring and support the termination application.

22. The Board does not agree that the rationale in *April Waterproofing* is confined to circumstances where there is a positive act by the employer in the sense urged by applicant's counsel. *Culliton III, supra*, itself speaks of circumstances wherein persons may be improperly "*retained*" as employees and, accordingly, not "employees in the bargaining unit" for purposes of a termination application (see paragraphs 26 and 27 of that decision). In the instant case, the employer was put on notice by letter dated November 22, 1991 that the Provincial ICI agreement was binding and that company's employees must be members in good standing of the union. The letter emphasized that the union would take any legal action necessary to ensure that the terms and conditions of the collective agreement were honoured by the company. In November 1991, subsequent to the certification decision, the union also initiated into membership five employees of the company. There is no evidence before the Board as to why J. Lyman, who had signed a membership card and who was referred to in the union's letter to the company regarding those who were to be initiated, was not, in fact, initiated into membership. In any event, in the instant circumstances (unlike in *F.H.R. Construction, supra*), nothing turns on the fact that Lyman applied for membership but subsequently was not initiated into membership. What stands as a critical difference between the instant case and *F.H.R. Construction*, is that here the union filed a grievance with the company on March 3, 1992 alleging contravention by the company of the union security clause in the employment of persons who were not members in good standing and who were not hired through the hiring hall. This grievance pre-dated the instant termination application filed on March 9, 1992.

23. The Board is cognizant of the fact that the grievance preceded the termination application only by a few days. Counsel submitted the explanation for the delay between October 31, 1991 and March 3, 1992 lay in the filing of the request for reconsideration of the certification decision and the fact that the reconsideration request was not dismissed until the Board decision dated February 20, 1992. In the Board's view, the proffered explanation is not relevant at least in the instant case. What is important - and why the circumstances herein differ from those cases which distinguished *April Waterproofing, supra*, - is that the union informed the company in November 1991 that the collective agreement was binding, that only union members in good standing must be employed and hiring effected through the hiring hall and the union did challenge the company's employment practices through the filing of a grievance before the termination application. The cases which have departed from *April Waterproofing* have resonated with the Board's concern that a union cannot waive its rights or ignore a known situation and seek to reassert those rights only at the point a termination application has been filed in order to defeat such an application (or act likewise with respect to a certification application filed by another union). Those concerns do not exist in the instant case, notwithstanding that the persons involved were employees prior to the filing of the certification application.

24. The Board regards the reasoning in *April Waterproofing, supra*, as applicable in the instant case. The union acted to assert its rights under the collective agreement prior to the filing of the termination application. To characterize the continued retention of persons not members in good standing of the union as not a "positive act" in the context of the mischief adverted to in *April Waterproofing* is merely a semantic distinction. In substance, for the Board to ignore the retention of employees in the face of the union's assertion of its rights would be to permit precisely the type of subversion of the union's bargaining rights *April Waterproofing* sought to avoid.

25. For the foregoing reasons, the Board finds that the five persons in question including the applicant, were not employees in the bargaining unit for purposes of the termination application. Accordingly, the application is dismissed.

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### **1820-90-R Graphic Communications International Union Local N-1, Applicant v. Moore Corporation Limited, Respondent v. Group of Employees, Objectors**

**Certification - Charges - Evidence - Representation Vote - Four employees who had not been on voters' list casting ballots - Employees arguing that they properly belong in bargaining unit and that their ballots should be counted - Board ruling that their segregated ballots not be counted and that it would not inquire further into their duties and responsibilities - Board permitting union to call evidence of handwriting expert as part of defence to forgery allegation in non-pay/non-sign inquiry - Board determining that card submitted by union reliable - Board commenting on procedure where non-pay/non-sign allegations raised subsequent to representation vote - Certificate issuing**

**BEFORE:** Susan Tacon, Vice-Chair, and Board Members W. H. Wightman and B. L. Armstrong.

**APPEARANCES:** Stephen Krashinsky, Joe Hann for the applicant; R. Dunsmore, E. Cooper and David Herle for the respondent; K. Coon for the objectors; G. Greenfield, E. Jewell, J. O'Donnell and B. Carroll on their own behalf on September 11, 1991 only.

**DECISION OF THE BOARD; May 1, 1992**

1. This is an application for certification in which the Board ultimately dealt with two issues in "bottom line" form. On September 13, 1991, the Board determined that four segregated ballots would not be unsealed and counted nor would the Board inquire further into the status or duties and responsibilities of the four individuals. On March 5, 1992, the Board certified the applicant, thereby refusing to dismiss the application outright as sought by the respondent and refusing to disregard the results of the representation vote.

2. This decision, then, provides the reasons for the above. However, it is first necessary to outline the lengthy and complex chronology of events as, during the hearing process, several matters arose which were disposed of on a bottom line basis for which reasons are to be provided herein or which should be recorded in this decision.

3. By decision dated November 5, 1990, the Board (differently constituted), *inter alia*, directed that a representation vote be held of the employees in the bargaining unit described in paragraph 4 of that decision. The parties had met with a Board Officer prior to the day scheduled for hearing of the matter, reached agreement on all matters in dispute between them and further agreed to waive their right to a formal hearing. Amongst those items resolved was an agreement of the parties on the voters' list.

4. The representation vote was held on November 14 and 17, 1990. Of the 125 persons on the voters list, some 118 persons voted. The scrutineers for the applicant, the respondent and the employee objectors certified that the balloting was fairly conducted, that all eligible voters were given an opportunity to cast their ballots in secret and that the ballot box was protected in the interest of a fair and secret vote. Those same parties consented to an immediate counting of the ballots and waived any objection to the regularity and sufficiency of the balloting. The results of the vote were sixty ballots marked in favour of the applicant, fifty-seven votes marked against the applicant and one spoiled ballot. That is, on the results of the representation vote, the applicant had established majority support in order to entitle it to be certified as bargaining agent for the employees in the bargaining unit.

5. Four persons who had not been on the voters' list did appear and wished to cast ballots. According to the Board's usual practice, the four (B. Carroll, E. Jewell, G. Greenfield, J. O'Donnell) were permitted to cast ballots and those ballots were segregated. Given the plurality of three in the vote result, the issue of whether the four segregated ballots should be counted was numerically relevant to the vote result. The four persons forthwith wrote individual letters to the Board requesting that their votes be counted.

6. In addition, counsel for the employee objectors wrote to the Board on November 22, 1990 asserting that one employee, Mark Hylund, signed a membership card but did not pay the required one dollar membership fee. The Board's usual inquiry triggered by such an allegation resulted in the Board's decision that the matter be listed for hearing. In that regard, the Board summonsed three persons, M. Hylund, R. Pikulik (the card collector) and J. Hann (the Form 9 declarant).

7. Further, the company raised several allegations in a letter dated November 26, 1990 as follows:

I am writing on behalf of the Company respecting the representation vote regarding the above-noted file. The Company objects to the vote for the following reasons:



- (a) There are three persons whose names were on the voter's list whom the Company scrutineer came to know subsequent to the agreement between the Union and the Company on the voter's list at the Labour Board on November 2, were not entitled to vote because they had not regularly worked more than twenty-four (24) hours a week for the seven weeks preceding the vote. He intended to object to these persons at the time they came to vote.

When the first such employee presented himself to the officer, the employee stated that he did not work over twenty-four (24) hours a week and inquired as to whether or not he could vote. The Officer replied before any objection could be recorded and indicated that the employee could vote because his name was on the voter's list. No objection was then voiced since the Company scrutineer understood the Officer to have effectively ruled against his objection. For the same reason, no objection was raised to the two other employees who presented themselves and voted, notwithstanding that the scrutineer had information on which to object. As a consequence, all three votes were cast and counted. The employees in question were:

**GABRIELLA CZERNIJ  
CARL VALENTINE  
HANNAH SCHOCH**

When another opportunity to object should have taken place, before the vote count when the sufficiency form is signed by representatives of each party, the Officer delayed its presentation. Instead, he opened the ballot box and divided most of the ballots. Then, he presented the form. He did not explain it as an opportunity to object or as a waiver. Instead, he said it simply authorized him to count the ballots. In those circumstances, with most of the ballots on the table, all parties signed the form and the Officer completed sorting and then the ballots were counted.

For these reasons, the Company submits that the objections remain valid and that the Board should still inquire into the status of the three named employees. If they were not entitled to vote, then there should be another vote since it is now impossible to recover their ballots.

- (b) The Company also objects to the vote since it has come to their attention that Union representative Hann offered to negotiate the exclusion of certain employees from the bargaining unit if spoiled ballots appeared. This offer was made on November 7, 1990, after the Union information meeting by Mr. Hann to employee Gordon Robinson. Employee Robinson voted. There was one spoiled ballot. Such an offer was an improper interference with the ability of employees to vote freely and therefore calls into question the legitimacy of the vote, itself.
- (c) The carrying out of the vote by the Board Officer was further flawed by the fact that required forms signed by the scrutineers on the occasion of each scheduled vote were not signed by the scrutineers until all voting had been completed for that particular scheduled vote.

8. Thus, when the hearing convened, there were three matters, broadly speaking, before the Board: the four segregated ballots, the non-pay allegation and the company's allegations. At the commencement of the proceedings, counsel for the company indicated that the company was withdrawing its allegations in (a) and (c) of the November 26, 1990 letter. It is useful to note at this juncture that, while evidence was led with respect to the allegation in (b), that matter was not pursued in final argument and the Board need not deal further with that question.

9. Counsel for the union raised, as a preliminary matter, that the Board should not inquire

into the non-pay allegation given that a representation vote had been held. Following submissions of the parties, the Board ruled, in part, as follows:

The Board is not persuaded that the non-pay allegation may be disregarded as the Board cannot be satisfied at this juncture that the only outcome of such an inquiry would be a Board directed vote.

The Board further ruled that it intended to hear evidence with respect to Hylund's card, including those witnesses summonsed by the Board and then to hear submissions and determine that issue. In those submissions, the parties were free to comment on what the Board should conclude from the evidence, including the context of the present case wherein a representation vote had already been conducted and the result known.

10. It should be noted that, at the commencement of the hearing, counsel for the union properly notified the Board that, on the basis of its information, it was asserting that M. Hylund had paid the required one dollar membership fee but that money constituted a *bona fide* loan from the collector Pikulik to Hylund. That is, the allegation of a non-pay was more properly characterized as a *bona fide* loan by an in-plant organizer. Union counsel acknowledged that the loan had not been repaid. The characterization of the issue was affected yet again by the testimony of Hylund to the effect that his signature on the membership card in the receipt portion was forged, i.e., a non-sign as well as a non-pay. All those matters are dealt with in detail *infra*. At this point, it is appropriate to add that the Board's intention to hear and determine the "Hylund card" issue was interrupted when J. Hann, the Form 9 declarant and a witness summonsed by the Board, suffered a stroke before testifying. The impact upon the proceedings of that unfortunate event will likewise be discussed further. It is sufficient to here note that the Board proceeded in the interim to hear and determine the question of the four segregated ballots.

11. The Board first provides its reasons for its ruling that the four segregated ballots not be counted and then proceeds to the "Hylund card" question.

12. The employer, as required, filed a schedule of employees who, in its view, were in the bargaining unit the union sought to represent. B. Carroll and G. Greenfield were not included on the schedule as, in the employers view, they did not fall within the bargaining unit description. Neither the union nor the employee objectors sought to add those names to the list of employees in the bargaining unit ultimately agreed upon. E. Jewell and J. O'Donnell were initially included on the schedule of employees but the three parties agreed that those names should be struck off as not properly included in the bargaining unit. As mentioned, none of the four were on the voters' list agreed to but all were permitted to cast ballots which were then segregated.

13. Shortly following the vote, each wrote to the Board asserting they should be entitled to have their ballots counted. It is useful to set out the those letters:

Barbara Carroll:

Although I was not on the voter's list, I exercised my right to vote, but my ballot was segregated. I feel that my vote should be counted. In my position as end user support, I deal directly with other employees that are included on the voters list. In fact I work very closely with the four technical support analysts, that are included on the voter's list, and I feel that I should have the same right as my fellow co-workers. I would like my vote to count, so that I have a say as to whether or not I would like to be represented by a union, and which union I would like.

G. M. Greenfield:

I feel that my segregated ballot should be counted. My name was not on the voters list, but I

feel that it should have been included. In my position as a customers service representative I deal directly with other employees that are included on the voters list. I feel that I should have the same right as my co-workers, and that I should have a say as to whether or not I would like to be represented by a union, and which union.

Elaine Jewell:

I feel that my segregated ballot should be considered along with the other votes. My name was excluded from the voters list despite the fact that as a production co-ordinator, I work directly with production staff that are included on the list. I also am aware that there are other co-ordinators like myself that were allowed to vote. I feel that I should have the same right as my co-workers in the decision to bring a union in to represent my needs. Please reconsider and include my name in the vote.

Janet O'Donnell:

I feel that my segregated ballot should be counted. My name was not on the voters list but I feel that it should have been included. My job is a production clerk. This job deals directly with various departments that were on the voters list such as data entry and operations. As a production clerk I deal with preparing all publications for Ontario and Quebec. As an employee of Moore I should have the same right as my co-workers to have a say as to whether or not I wish to be represented by a union.

14. The Board heard submissions for counsel for the union, the company and the employee objectors as well as from the four individuals concerned. Those representations are next summarized.

15. Union counsel submitted that the Board's process in certification applications wherein the parties meet with a Board Officer to seek to resolve matters in dispute without a hearing on agreement of the parties would be undermined if, following that agreement, the parties or individual employees were subsequently permitted to challenge that agreement. In that regard, counsel did not differentiate between the parties actually signing the agreement and the individual employees. It was argued that the Board should not go behind the parties' agreement particularly to reopen the question of the bargaining unit description and the voters' list once the union had won the vote. Counsel contended that the four persons could have appeared at the Board Officer meeting and, having chosen not to attend, could not now complain about their exclusion from the bargaining unit and the voters' list. Further, counsel added that, if the Board ascertained that the four had signed the petition filed in opposition to the application, the Board should conclude that the four *were* represented at the Board Officer meeting by counsel for the employee objectors and, hence, were expressly bound by the parties' agreement.

16. Counsel for the employee objectors disagreed with the last proposition, asserting that the signing of the petition did not constitute an agreement to be represented by counsel for the employee objectors, at least for all purposes connected with the certification application. Counsel acknowledged that there were "tradeoffs" between parties in reaching agreements but submitted that individual rights were not always considered in striking those deals. In the instant case, the four took the first opportunity at the vote to preserve their rights and should be able to litigate whether they fell within the office and clerical exclusion and, if not, they should be allowed to vote. It is also useful to set out the following letter dated November 23, 1990 from counsel regarding this issue:

We act as counsel for the objector in the above referenced matter.

We are now in receipt of the Returning Officer's Report of Vote and make the following representations regarding the four segregated ballots:



- the four employees whose ballots were segregated, although not on the list, share the same community of interest as those on the list and therefore are properly within the bargaining unit.
- as members of the bargaining unit the four employees are proper parties to this application and have an independent right to vote.
- the four employees have demonstrated that they wish to make the representation that they have the right to vote by showing up and voting.
- as parties in this matter, the employees cannot be denied their right to be heard as to their right to vote.

17. Counsel for the company agreed that the company was bound by the parties' agreement to exclude the four persons from the bargaining unit. Counsel further agreed that the Board controlled its own processes and that the concern for finality was important. Counsel submitted that the individual employees could challenge the bargaining unit description and could seek to have litigated whether or not they fell within the exclusion although there was no absolute right, under the statute, of individuals to have their duties and responsibilities fully litigated in regard to their exclusion from or inclusion in the bargaining unit. It was argued that the Board had to determine whether there was adequate notice to the individuals, prior to the vote, that their rights might be affected so that they were precluded from raising their concerns at this point. However, counsel added that, in the circumstances, it would be difficult to conclude that the four had not made reasonable efforts subsequent to the vote to raise their concerns.

18. All four individuals asserted that the bargaining unit description itself was not being challenged. Rather, the challenge was whether they should be excluded as "office, clerical and sale staff". Each reiterated the views expressed in their letters set out above with respect to their opinion that each worked sufficiently closely with bargaining unit employees to be included in the bargaining unit. B. Carroll commented that she had assumed she would be in the bargaining unit as "technical support" rather than "office, clerical and sales". It was not until the voters' list was posted that she realized she had been excluded. G. Greenfield concurred with the submissions of B. Carroll. E. Jewell stated that, had she understood what was going on at the Board Officer meeting, she still would have assumed she was included in the bargaining unit given her duties and responsibilities. It was only when she appeared to vote that she had the opportunity to express her position that she should have been included in the bargaining unit all along. J. O'Donnell indicated that the first time she could express her view that she should be included in the bargaining unit was when she realized her name was deleted from the voters' list and she did so at the vote by seeking to cast her ballot.

19. In reply, counsel for the union argued that a fundamental issue in the agreement reached between the parties was the composition of the bargaining unit and the voters' list. It was submitted there was clear notice that the Board Officer meeting could affect individual employees and the four chose not to attend. To open up the parties' agreement at this stage after the vote results were known would preclude the likelihood of future agreements as, in effect, any individual employee could veto such agreements after the fact. Counsel added that the employee objector(s) appearing at the hearing or the Board Officer meeting was traditionally held to represent all employee objectors, in the instant case, including the four persons now seeking to have their vote counted. In any event, counsel submitted that the four had been afforded the opportunity to make full submissions to the Board on the issue.

20. The Board has an established practice in certification applications of the parties meeting with a Board Officer to seek agreement on the issues relevant to a certification application, includ-

ing such matters as the bargaining unit description, composition of the bargaining unit, trade union status, form and level of membership support filed by the applicant, the Form 9 Declaration, and any petitions filed in opposition to the application. For many years, that Board Officer meeting occurred on the morning of the day scheduled for the hearing. Currently, in the interest of expeditious resolution of certification applications, the Board schedules the Officer's meeting one week prior to the scheduled hearing date. In many instances, as here, the parties are able to resolve all matters concerning the certification application and expressly waive their right to a hearing. Where there are issues remaining in dispute, the Board convenes the hearing as scheduled, unless the parties have agreed the matter may be resolved in some other fashion, such as a Board Officer appointment to conduct the examination appropriate to the circumstances. The current practice ensures full discussion of the matters at the Board Officer meeting and, where issues remain outstanding, the commencement of a Board hearing the following week. The former approach generally resulted in the parties utilizing a considerable portion of the hearing day in the Officer's meeting so that the remaining hearing time could not dispose of the issues in dispute. This resulted in difficulties in scheduling continuation dates with concomitant delay in dealing with the certification application and increased costs to the parties. The institutional interests of the Board and concern for the labour relations impact of considerable delay in dealing with certification applications underpin the present Board practice. The Board must be sensitive to the effect on the current practice in considering whether to permit challenges to parties' agreements at the Board Officer meeting, which concerns are raised subsequent to that agreement, and, in the instant case, subsequent to the representation vote and the counting of the ballots.

21. The Board, as well, has always had a profound interest in respecting the agreements of the parties which resolve some or all of the issues initially in dispute. A significant percentage of the Board's caseload is resolved through the parties' agreement. Indeed, it may fairly be said that the continued functioning of the Board depends upon fostering such settlements. The Board's concerns in this regard go well beyond the administrative. Rather, the Board has consistently viewed settlements reached by the parties themselves, with the assistance of a Board Officer if necessary, as the preferred means of resolving labour relations disputes. The Board need not here reiterate at length its view that, in the context of a collective bargaining relationship, matters resolved by the parties on a mutually acceptable basis enhance the relationship, in furtherance of the goals of the statute as expressed in the preamble. For these reasons, as well as the interest of finality in resolving disputes, the Board has been extremely reluctant to do other than uphold and recognize parties' agreements as binding and dispositive of those issues. To this end, the Board has refused to permit parties to resile from agreements except in truly extraordinary circumstances. Further, the Board has not sought to inquire into the reasons which motivated each party to strike the agreement reached, i.e. to go behind the deal. Absent highly unusual circumstances, and none are raised in the instant case, the motivation of the parties, their "tradeoffs", have not been of concern to the Board. Rather, the Board has focused on the settlement reached by mutual agreement.

22. In the instant case, there is no dispute that the company, the union and the employee objectors were represented at the Board Officer meeting, reached agreement on the relevant matters and signified that agreement, including the waiver of a formal hearing, in writing. Given that, the Board is not prepared to permit any of those parties to resile from that agreement which included agreement on the bargaining unit description and the voters' list. (See generally, *C. E. Jamieson Co. (Dominion) Limited*, [1987] OLRB Rep. July 953; *Union of Canadian Transport Employees*, [1985] OLRB Rep. Oct. 1541; *Laurent Lamoureux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618; *Fonthill Lumber Ltd.*, (1964), 64 CLLC ¶16,305; *Warner Brothers Distributing (Canada) Limited*, [1974] OLRB Rep. Dec. 883; *J J's Restaurants Limited*, [1977] OLRB Rep. July 465.

23. The issue for the Board is whether the four individuals are likewise bound by that

agreement and cannot now raise their concern that their votes, which were segregated, should be counted. The Board need not deal with the assertion of union counsel that the four were represented by counsel for the employee objectors either generally or, at least, if the four signed the petition opposing the certification application. Nor need the Board deal with the question as to whether an employee in a certification proceeding has an absolute right to have his or her duties and responsibilities litigated to determine whether he/she is included in the bargaining unit, notwithstanding and contrary to the agreement of the company and the union (and employee objectors, if any) on the exclusion or inclusion of that individual. Rather, in the Board's view, the issue turns on the process and the adequacy of notice to employees, including the four persons now before the Board, of that process.

24. It was not disputed that employees are potentially affected by an application for certification and, thus, are entitled to notice of the proceedings. Further, it was not seriously disputed that employees are entitled to make submissions with respect to relevant matters, such as, the bargaining unit description and composition of the bargaining unit. The Board's practice, as required by the Regulations, is to have notices posted in the workplace informing employees of the application and of the process which will determine the outcome of that certification application. In the instant case the notice read as follows:

File No. 1820-90-R

**Form**

**Labour Relations Act**

**NOTICE TO EMPLOYEES OF APPLICATION FOR CERTIFICATION**

**AND OF HEARING**

**BEFORE THE ONTARIO LABOUR RELATIONS BOARD**

Between:

Graphic Communications International Union Local N-1,

Applicant,

- and -

Moore Data Management Services Division,

Respondent.

**TO THE EMPLOYEES OF Moore Data Management Services Division**

1. TAKE NOTICE that the applicant, on October 12, 1990, made application to the Ontario Labour Relations Board for certification as bargaining agent of employees of Moore Data Management Services Division in the following unit claimed by the applicant to be appropriate:

"All employees in the employ of the respondent in the City of Scarborough, save and except forepersons, persons above the rank of forepersons, office, sales & clerical staff, students employed during the school vacation period and persons employed for not more than 24 hours per week."

2. AND TAKE NOTICE that the hearing of the application by the Board will take place at the Board Room, 400 University Avenue, Toronto, Ontario on the 9th day of November 1990, at 9:30 a.m. (Local time)



THE PURPOSE OF THE HEARING is to hear the evidence and representation of the parties with respect to all matters arising out of and incidental to the application referred to in paragraph 1.

3. The Board has fixed Wednesday, the 24th day of October, 1990, as the TERMINAL DATE for this application.

4. -(1) The Board will not hear evidence or representations of employees objecting to certification of the applicant unless one or more documents, sometimes referred to as petitions, expressing objection to the certification of the applicant are filed with the Board.

(2) A document referred to in subsection (1),

- (a) must be signed by the objecting employee or employees;
- (b) must be,
  - (i) received by the terminal date if sent other than by registered mail, or
  - (ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail; and
- (c) must be accompanied by the name of the employer concerned and the return mailing address of the employee or employees filing the document or of the representative of the employee or employees.

(3) The objecting employee or employees or a representative of the objecting employee or employees MUST ATTEND THE BOARD'S HEARING AND PRODUCE A WITNESS OR WITNESSES who, from personal knowledge and observation, can describe the circumstances in which each document was prepared, circulated and signed, and verify each signature.

**No oral evidence of employee objection to certification of the applicant will be accepted by the Board except to identify and substantiate written evidence which complies with these requirements.**

5. IF, YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

6. Other relevant statements, if any: - N/A

YOUR ATTENTION IS DIRECTED TO THE ACCOMPANYING EXPLANATORY NOTICE TO EMPLOYEES.

Please be advised that a Board Officer from the Ontario Labour Relations Board will convene a meeting of the parties to this Application for Certification in its Board Room, 6th Floor, 400 University Avenue, Toronto, Ontario on November 2, 1990 at 9:30 a.m. (Local time)

The purpose in attending the officer's meeting will be to address all questions that may be raised in connection with the appropriateness for collective bargaining purposes of the unit(s) proposed in the application and any reply, the membership support for the union, and such other issues as may arise as a result of the application filed. This meeting may result in the Board issuing a decision in this matter *without an*

*oral hearing*, taking into consideration agreements reached between those attending the meeting.

DATED this 15th day of October, 1990.

T. A. Inniss

Registrar

Ontario Labour Relations Board

#### NOTES

- I. Any communication with respect to this application should be addressed to:

The Registrar  
Ontario Labour Relations Board  
400 University Avenue  
Toronto, Ontario  
M7A 1V4

- II. The requirements set out in paragraph 4 of this notice relate only to evidence of employee objection to certification of the applicant trade union. If you attend at the Board's hearing and wish to make representations about something other than employee objection to certification of the applicant, paragraph 4 does not apply. However, your attention is directed to section 72 Rule of the Board's Rules of Procedure which applies in such situations and provides, in part, as follows:

72.-(1) Where a person intends to allege at the hearing of an application of complaint, improper or irregular conduct by any person, he shall,

• • • •

(b) file a notice of intention that shall contain, a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

• • • •

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included ... in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it thinks advisable.

• • • •

25. The employees of the company were informed that the bargaining unit sought was an all employee unit save and except several exclusions and, for the Board's purposes herein, excluding office, sales and clerical staff. The hearing date was scheduled for November 9, 1990 to hear "the evidence and representations of the parties with respect to all matters arising out of and incidental to the application". Employees are expressly cautioned that "if you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings". The employees' attention is expressly directed to notice of a Board Officer meeting of the parties to the certification application on November 2, 1990 at a specified time and place.

The purpose of the Officer meeting is clearly stated as addressing *all* questions in connection with the bargaining unit description, membership support for the union and “*such other issues as may arise* as a result of the application filed”. [emphasis added]. The consequences of the Board Officer meeting for the employees is also expressly stated and bears repeating: “*This meeting may result in the Board issuing a decision in this matter without an oral hearing on the basis of agreements reached between those attending the meeting.*” [emphasis added]

26. In the instant case, there is no suggestion that the posting was not specific or was otherwise defective nor was posted for an unreasonably short period. Nor was it suggested the agreement of the parties at the Board Officer meeting was tainted in any way. The thrust of the representations of the four persons was that they *assumed* they would be included in the bargaining unit and did not fall within the “office, clerical and sales” exclusion. Once the voters’ list issued and they realized they were not on the list, they decided to pursue their interests by appearing at the representation vote and seeking to cast ballots. In the Board’s opinion, it was too late at that point to challenge, on the grounds asserted and in the circumstances of this case, the agreement of the parties reached at the Board Officer meeting.

27. In an organizing drive and certification application, some employees will support the union while others may actively or passively oppose the applicant. Some may well be neutral or disinterested. The Board provides notice to all employees through the posting of relevant information, including the process to be followed by the Board. It is for employees to decide whether and to what extent to become involved. Those who support the union are likely content to have their interests in the application represented by the union applicant. Those against may actively oppose the union through filing a petition with the Board expressing their views. Such employee objectors are entitled to appear as parties, through a representative, at the Board Officer meeting and the Board hearing, if one is held. Other employees may well be content with whatever results from the process, including agreements between the union, the company and employee objectors, if any. However, employees not content to have their interests represented by the union or an employee objectors’ representative ignore the Board Officer meeting (and any subsequent Board hearing) at their peril. The process is structured to provide persons whose rights may be affected with an opportunity to be heard at the Board Officer meeting. The overwhelming number of employees, in the Board’s experience, will not seek to participate at that meeting, for the reasons given. Those affected employees whose interests may not coincide with those of the other parties should not be permitted to undermine the agreements properly reached by those other parties and subvert the process by which certification applications are resolved by raising their personal concerns subsequent to the reaching of those agreements. The Board need not repeat here its earlier comments about the importance of parties’ agreements and the institutional interests of the Board in that regard or the rationale for the Board’s practice in certification applications. It is sufficient to reiterate the Board’s conclusion, for the foregoing reasons, that the Board will not unseal and count the segregated ballots of the four individuals nor further inquire into their status or duties and responsibilities.

28. The Board next turns to the question of Mark Hylund’s membership card. Before setting out the Board’s factual findings, it is necessary to address several matters which arose during the litigation of the Hylund card issue. There are not dealt with in chronological order.

29. The Board, as is usual, summonsed the Form 9 declarant, J. Hann to testify with respect to the “non-pay” allegation. Prior to Hann’s testifying, counsel for the union informed the Board that J. Hann had suffered a stroke and submitted medical reports attesting to Hann’s medical condition and prognosis. The reports were disclosed to the other parties who understood the sensitive and confidential nature of the material to which they were being granted access. The gist



of the assessments was that Hann was not able to testify at that point. Counsel for the union submitted that J. Hann's testimony was not critical and the Board could deviate from its usual process of hearing from the Form 9 declarant. Following representations from all parties, the Board ruled that the appropriate balancing of the various interests was to proceed to hear the evidence of R. Pikulik and any other evidence the parties wished to call with respect to the non-pay issue and direct a further assessment in three months; union counsel was to assist in obtaining the reports as he had done initially. The reports were to be filed with the Board and copied to the other parties. The Board, then, would reassess the situation and, if J. Hann was still unable to testify, the Board would hear further submissions from the parties with respect to the appropriate method of determining the non-pay issue. The Board was provided with the appropriate medical reports in February 1992. At that point, J. Hann did testify.

30. M. Hylund testified that he did not pay the one dollar membership fee nor did he sign his name on the receipt portion of the membership card. He did identify his signature on two other places on the card but maintained his position that the third signature purporting to be his was a forgery. Counsel for the union then sought to put to Hylund the preliminary reports of two forensic experts in handwriting analysis and ultimately to call those two persons and/or file their final reports with the Board. Counsel argued strenuously that the allegation of forgery by a union official or organizer was very serious and the union had the right to defend itself against that allegation. Evidence of handwriting experts was clearly relevant to the issue and it was argued that, if the Board precluded such evidence, that would constitute a denial of natural justice. Opinion evidence by experts was admissible and had been received by the Board in the past; the appropriate tests were whether such evidence may properly be characterized as relevant and probative of the issue in dispute. Although conceding that the calling of such evidence, and the time needed to prepare the final reports, would delay the adjudication of the non-pay allegation, counsel contended that must be balanced against affording a party against whom a serious allegation of impropriety is made with the opportunity to mount a full defence. Counsel assured the Board any concomitant delay would not be regarded by the applicant as the Board's responsibility.

31. Counsel for the company acknowledged that the Board could receive opinion evidence from experts but the issue was really one of *who* should be permitted to call such evidence. If the union was permitted to call such witnesses, the same right should be accorded to the other parties. Counsel argued that, where the issue was an non-pay allegation, i.e., where the concern with the reliability of the membership cards was the *Board's* and it was the *Board* which conducted the initial inquiry and summonsed witnesses, it was appropriate for the Board to determine whether expert evidence was needed and to call that evidence itself. Counsel for the employee objectors concurred with those representations.

32. Cases referred to in the submissions of the parties included: *Wallace Barnes*, [1965] OLRB Rep. July 282; *Heart Construction Co. Ltd.*, [1983] OLRB Rep. Jan. 84; *Roytec Vinyl Co.*, [1990] OLRB Rep. June 720.

33. The Board gave its ruling orally with reasons to follow. That ruling, in part, is herein summarized.

The Board has considered the parties' submissions and gives its ruling in point form with reasons to follow.

1. Pursuant to section 102(13) [now section 104(13)] of the *Labour Relations Act*, the Board has the authority to determine its practice and procedure provided that full opportunity is given to the parties to present evidence and make submissions.

2. In determining this issue, the Board has balanced consideration of such matters as procedural fairness, expeditious resolution of labour disputes and such like.
3. The Board does not disagree with the comments regarding handwriting expert evidence in *Roytec, supra*, in the context of that case.
4. In the context of this case, the Board is not prepared to call handwriting experts as the Board's own witnesses.
5. The Board is prepared to permit the union to call opinion evidence from handwriting experts as part of its defence to the issue before the Board with respect to Hylund's card.
6. The Board is of the view it is appropriate and useful that the union put the following to the witness at this juncture:

"I have preliminary reports from two persons whom the union intends to prove are handwriting experts. That preliminary report, based on an examination of the membership card, is that, in their respective opinions, the signatures are so similar as to lead them to conclude the three signatures were made by the same person. The two experts are prepared to give a final report of their assessment and to testify in these proceedings. Given what I have now told you do you still maintain the third signature is not yours?"

7. If the witness changes his testimony and states that the third signature is his, that ends the issue with respect to expert evidence.
8. If the witness maintains the third signature is not his, the Board directs the union to complete the remainder of its cross-examination and counsel for the company and counsel for the employee objectors to likewise complete their "reply" subject to the following.
  - (a) The witness will be recalled if any party so requests following receipt of the final reports (such request is to be made forthwith in writing to the Board following receipt of those reports). This will ensure that all parties have the opportunity, if so desired, to further question the witness with respect to reports.
  - (b) Union counsel is directed to have the final reports completed as soon as possible and copied to the other parties forthwith upon their receipt by him.
  - (c) In the interim, the other parties will be provided with access to the original card to permit either or both to consult expert(s). The Board expects the other parties to have their handwriting experts' reports, if any, produced as soon as possible and copied to the others as the Board has directed the union.

The remainder of the ruling essentially dealt with the production of specimen signatures which is further addressed below.

34. The Board next provides the reasons for its ruling. The Board commences its analysis with the reiteration of the commonlaw rule that a witness may give evidence solely with respect to facts within his/her personal knowledge. That said, the commonlaw has also long recognized an exception to that stricture in regard to experts who, once it is established that the individual is qualified to render an opinion on the matter in question, is permitted to give what is referred to as "opinion evidence". The courts, the Board and arbitrators have often heard from expert witnesses on various subjects. Medical practitioners and handwriting specialists are but two examples of

expert evidence which had been recognized and admitted in adjudicative proceedings. As noted earlier, medical opinion evidence in the form of written medical assessments was admitted with respect to the ability of J. Hann to testify. Counsel for the union sought to have admitted expert evidence, in the form of written reports and, if necessary, oral testimony, from two forensic handwriting experts. As mentioned, there is no dispute that the persons in question possess the necessary qualifications and skill to entitle them to give opinion testimony.

35. The issue for this Board is whether counsel should be permitted to lead that evidence and/or whether the Board should do so in the instant case. There can be little doubt that, had the impugned signature not been on a membership card, that is, had the alleged forgery concerned a document which was arguably relevant to the issue in dispute, the testimony of handwriting specialists would be admissible. The admissibility of the evidence is to be distinguished from the weight accorded such evidence and it is understood that the receiving of expert testimony in no way decides the issue nor relieves the adjudicator of responsibility for the ultimate determination. Expert evidence - and it is not uncommon for each party to call its own experts who may well give conflicting opinions - does no more than assist the adjudicator in resolving the question.

36. The Board's authority to control its practice and procedure is found in section 104(13) [formerly section 102(13)] of the Act. In so doing, the Board shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions. The somewhat broad statement of the admissibility of evidence from handwriting specialists in the preceding paragraph does not mean that such evidence must be admitted in every case. The Board would also consider factors such as the length of the delay in concluding the proceedings which would be occasioned by the request to introduce such evidence, the possible prejudice to the parties not seeking to lead such evidence, the identity of the party desiring to introduce such evidence in the context of the nature of their interest in the proceeding and the issue in question, the potential consequences for the party wishing to have admitted such evidence if such evidence is precluded by the Board and the point at which a party seeks to introduce such evidence in relation to the point at which the issue crystallized. This list is not exhaustive but illustrative of relevant considerations.

37. In the instant case, it is the applicant against whom the the allegation of forgery is made (given Hylund's testimony) which wishes to introduce the evidence of handwriting specialists as part of its defence. Counsel for the applicant union assured the Board that the applicant was prepared to bear whatever hardships were generated by the delay in concluding the proceedings in order to introduce such evidence. Moreover, counsel for the applicant put to Hylund, in cross-examination and without delay to the proceedings, the preliminary reports of the handwriting experts. As noted in the oral ruling, the issue of the formal introduction of expert evidence would only be pursued if the witness maintained the signature in question was a forgery. There can be no dispute that the applicant has a direct and immediate interest in the precise issue before the Board, namely, whether the union, through its officials or organizers, forged Hylund's signature on the membership card filed in support of the certification application. It was not contended that the delay by the preparation of the report of the handwriting experts would prejudice the other parties. The potential consequences for the applicant of the Board's determination of the forgery issue are draconian: the Board, if it concludes that the signature was forged by union officials or organizers, could well dismiss the application outright, notwithstanding the results of the representation vote.

38. Consideration of each of these factors would support a conclusion that the union should be permitted to introduce the evidence of handwriting specialists in the instant case. Should the conclusion be different because it is a membership card which is the document in question? The Board has rarely been called upon to canvas this type of issue. In *Wallace Barnes, supra*, the appli-



cant apparently had a handwriting expert inspect, at the Board's offices, certain membership cards and compared the signatures with the specimen signatures provided by the respondent. The applicant conceded the signatures in question had been forged but asserted the perpetrator was not an officer or agent of the applicant. The applicant sought to lead the evidence of handwriting experts to establish that fact. It is simplest to quote the following passage from that case:

The applicant further alleged that it had suspicions as to the identity of the guilty person and requested the Board's assistance to aid the applicant in determining his identity. The applicant requested the Board to compel some ten or twelve persons to submit specimen signatures which would be used by the applicant's handwriting expert for the purpose of attempting to ascertain if one of the ten or twelve persons had fabricated the signatures on the five cards. This request was strongly opposed by the other parties.

The membership cards in question constitute part of the documentary evidence of membership submitted by the applicant. It is therefore incumbent upon the applicant to support, qualify or explain its evidence of membership. For this purpose the applicant will be permitted, following the Board's inquiry of the Board's witnesses into the non-pay allegations, to call as a witness, any person whom the applicant believes will assist the applicant.

None of the ten or twelve persons from whom the applicant has requested specimen signatures are parties or witnesses before the Board, therefore the Board is not prepared at this time to grant the request made by the applicant.

At some point thereafter, the applicant requested leave to withdraw the application; leave was granted subject, as would be the Board's practice in the circumstances of the case, to the imposition of a six month bar. Thus, the matter was not further considered by the Board.

39. The question of handwriting analysis in connection with membership cards also arose in *Roytec Vinyl, supra*. It is appropriate to set out the Board's reasoning in that case.

35. The request to have access to the membership evidence for the purpose of having the employers' handwriting analyst review it is a little more complicated. As noted earlier, section 111(1) of the Act protects the confidentiality of certain information:

111.-(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no persons shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

36. In *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223, the Board commented that this provision was enacted in response to *Re Ontario Labour Relations Board; Re Toronto Newspaper Guild, Local 87 and American Newspaper Guild (CIO) and Globe Printing Co.*, [1953] 2 S.C.R. 18 (S.C.C.) in which the Courts overturned a Board decision preventing an employer from cross-examining the deponent of an affidavit filed confirming the membership evidence. The Board went on to emphasize the importance of secrecy with respect to membership records in ascertaining employee's wishes:

The object of certification proceedings before the Board is to ascertain the true wishes of the bargaining unit employees with respect to trade union representation. The Board's experience has been that secrecy with respect to trade union membership is essential if the true wishes of employees are in fact to be ascertained. The lack of anonymity tends to have a significant chilling effect upon both legitimate activities of trade unions and the exercise of employees of their rights under the Act, whether or not unfair labour practices are perpetrated by unscrupulous employers (and we do not suggest that this respondent is such an employer).

37. In *Brian Chevrolet Oldsmobile Ltd.*, [1989] OLRB Rep. April 324, the Board also said that section 111 preserves the anonymity of union supporters to protect them from possible employer reprisals. In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers. And those opposing the union may be concerned that if it is ultimately certified to represent employees, their working conditions or job security may be adversely affected because of their views. As a result, section 111(1) provides a critical component in the process of union organization contemplated by the *Labour Relations Act*.

38. That process features the assessment of the level of union membership among employees as the primary method set out in the Act for certification of a bargaining agent. (See *Grand & Toy Limited*, *supra*, and *Brian Chevrolet*, *supra*). As the Board observed in *Unlimited Textures Company*, *supra*, "[i]mportant considerations underlie the Legislature's choice between membership evidence and the representation vote as the means of ascertaining majority wishes (see Weiler, P. C. *Reconcilable Differences*, (Carswell, 1980), pp 37-49 for a review of these considerations)". The membership assessment is made on the basis of written membership evidence submitted in the proper form by the union (see section 73 of the Board's Rules of Procedure). There are a number of requirements attached to that evidence which are provided for both in the Act (see section 1(1)), and in the Board's jurisprudence. For example, in *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. 444 sets out the following:

In an application for certification, the Board must be satisfied that every membership card upon which an applicant trade union relies was signed by the employee on whose behalf it has been tendered and that each employee has paid the initiation fee or dues that must accompany it on his own behalf. This is accomplished by ensuring that documentary evidence of membership shows, on its face, that the employees to whom it relates have applied for membership in the applicant, and have paid to it, on their own behalf, at least \$1.00 in respect of initiation fees for monthly dues in it, and that the appropriate declaration attesting to the regularity and sufficiency of that membership evidence is filed. It is also desirable that the documents show the date on which any person to whom the application and payment was made, although this can be established using *viva voce* evidence.

39. In addition, there are a number of safeguards integrated into the processing and assessment of membership evidence by the Board. Every single membership card is painstakingly checked to insure that it complies with the Board's requirements for membership evidence. As well, the signature of each employee on each card is checked against a sample signature for that employee provided by the employer. This process is performed at least twice and sometimes more often on each application by Board clerks who are specially trained to this end. Any discrepancies noted by them are brought to the attention of the panel deciding the case. Not infrequently, the panel will utilize the Board officer screening process to further check on a so-called "doubtful" signature and, as described in the Board's jurisprudence, membership evidence is held to strict standards (see *Grand & Toy*, *supra*). While no process for assessing employee wishes or membership is absolutely foolproof, generally speaking it is fair to say that this rigorous procedure has served the labour relations community well for many years. And as the Board noted in *Grand & Toy*, *supra*, errors in this process are extremely rare.

40. In this context, we had a number of concerns with respect to the employer's request. Firstly, the only outstanding allegations involved assertions that certain employees failed to pay \$1.00 on their own behalf when they became members of the union. The employer was unable to point to any cards on which it claimed employees' countersignatures had been forged. In addition, and presumably unknown to the employer, no signed dollar bills were filed with the membership evidence, so there was no question of comparing signatures on membership cards with

such dollar bills. The only dollar bills submitted were two which were entered by the union as exhibits relating to non-pay, rather than non-sign allegations. In these circumstances, we were concerned that the employer's request was not likely to yield evidence which would be of any use in resolving the disputes before us.

41. Secondly, we were not convinced that the introduction of partisan experts would add any additional safeguards to the process already in place, and in particular provide any assistance in disposing of this certification application. If we permitted one party's expert to examine the membership evidence, we would be hard-pressed to refuse another party's request in the same case, or even in other cases. The result might well be that the Board's effective and expeditious processes would be supplanted by a battle of experts, with the likely result of delay and expense. There is nothing in the Act or the Board's Rules which contemplates this. Indeed, the Board's mandate to resolve labour relations disputes in an informal and expeditious manner militates against it.

42. Thirdly, and most importantly, providing access to the membership evidence by the employer's handwriting expert flies in the face of section 111(1) and its purpose. The cloak of secrecy provided by section 111(1) would be meaningless if the Board was prepared to provide access to the membership evidence to the parties or their agents on the basis requested by the employer. No employee is likely to be encouraged by section 111(1) to freely express his or her views on unionization through the membership process if the employer or the union could subsequently ascertain those views by making this kind of request. In other words, access to the membership evidence for this purpose would seriously undermine the purpose of section 111(1), while yielding little likely benefit in terms of the stringency or effectiveness of the Board's processes.

43. Section 111(1) provides the Board with a discretion with respect to revealing records such as membership evidence. However, the Board has said that this discretion is only exercised in exceptional circumstances for compelling reasons where such disclosure would further the purposes of the Act (*Grand & Toy, supra*). The request before us was not such a case and as a result, we dismissed it.

40. The Board, in its oral ruling, indicated its concurrence with the reasoning in *Roytec Vinyl, supra*, in the context of that case. The Board has, over the years, assiduously protected the secrecy of the membership cards themselves to guarantee the names of persons signing cards are kept confidential as far as possible in accordance with the wording and purpose of section 113(1) [formerly section 111(1)]. To that end, the Board has developed its practice of checking membership cards, as described in paragraph 39 of the *Roytec* decision. However, in that case, there were no allegations that signatures on specific cards had been forged. The issues before the Board was restricted to allegations that certain employees had failed to pay one dollar on their own behalf when joining the union. The admission of evidence from handwriting experts would not likely assist in resolving that issue. Moreover, the employer's request was essentially for wholesale access to the membership evidence by the employer's handwriting expert. The Board agrees with the reasoning in *Roytec* that such access "flies in the face of section 111(1) and its purpose" and that all parties would have to be provided with such access if that right was granted to one.

41. The instant case starkly contrasts with the circumstances in *Roytec, supra*, in several critical respects. The allegation of forgery is expressly raised and in respect of an identified employee, Hylund. The allegation comes from the mouth of Hylund himself. The evidence which the union counsel seeks to introduce concerns only Hylund's card. Hylund's identity has already been revealed given the non-pay allegation and the decision of the Board to set the matter down for hearing following the Board's initial inquiry. There is no longer any "confidentiality" to protect in regard to Hylund's card. This is not an instance wherein wholesale access to membership evidence is sought or there are wholesale concerns about the authenticity of the signatures on the membership cards in general. The Board need not repeat here, but affirms, its specific analysis in paragraphs 36 and 37 above.



42. In summary, for the reasons given, the Board ruled that the union would be permitted to call opinion evidence from handwriting experts as part of its defence to the forgery allegation. A similar right was accorded to the other parties if they so wished. The process was structured to maximize the use of hearing time available and facilitate production of the expert's reports as expeditiously as possible. Access by all parties to the specimen signatures and original membership card was ensured while maintaining the integrity of the documentation. In essence, the material was released to counsel (or his designated agent) and then returned to the Board to ensure the material was not tampered with prior to its re-release.

43. The Board, in its oral ruling, declined to call a handwriting expert as its own witness. That need be dealt with only briefly. It is accurate to note that non-pay/non-sign inquiries are unusual and a departure from the Board's normal matter of proceeding in that the Board summonses those persons who, in the Board's view, are necessary to the Board's determination of the issue. Generally, those include the individual employee, the collector of the card and the Form 9 declarant. The Board first questions those witnesses summonsed by the Board before permitting the other parties the opportunity to question the witnesses. However, following the testimony of the persons summonsed by the Board, the other parties are permitted to adduce relevant evidence with respect to the non-sign/non-pay allegations. The Board's practice has been to depart from the adversarial model as little as possible given the rationale for the adversarial model of litigation but taking into account as well the Board's concerns with the confidentiality of membership evidence and the fact that non-sign/non-pay allegations go to the heart of the reliability of membership evidence which, as hearsay evidence, requires additional assurances of its reliability through Form 9 declarations. The Board is not persuaded that there is a sound basis for departing from the Board's established practice of summonsing the usual persons and leaving it to the parties to adduce whatever other evidence they see fit, subject to questions of relevance, probative value, etc. which might arise with respect to specific evidence which one party wished to lead.

44. Counsel for the union also requested that the Board direct Hylund to produce or create, if necessary, twenty specimen signatures. The basis for that request was that the handwriting experts needed that number of signatures for comparison purposes and analysis. That request raised issues of the compulsion to produce existing specimen signatures versus a direction to create new specimen signatures and the rights of the witness to retain his own counsel, to be cautioned by the Board with respect to the implications and consequences of that request and the impact, if any, of the Charter of Rights and Freedoms. Given the novelty of the matter, the parties wished time to consider their positions prior to making submissions. It was agreed that written representations would be received by the Board.

45. The Board ruled as follows in writing on May 22, 1991:

2. The parties filed written representations with the Board by the dates specified. As directed by the the Board without objection, Mark Hylund received copies from the parties of those representations. Given the last date for representations and the date the hearing is scheduled for continuation, the Board gives its ruling with brief reasons. The Board does not regard it as necessary to set out the parties' submissions.

3. The questions on which the Board received representations may be stated as follows:

- (a) whether Mark Hylund may consult with and be advised by counsel during the course of his testimony;
- (b) whether the Board has the authority and/or should compel Mark Hylund to create twenty specimen signatures as requested by union counsel for use by an expert witness in comparing those specimen signatures with those on the

application for membership, given Mark Hylund's testimony that the third signature which appears on that membership application is not his;

- (c) whether the Board has the authority and/or should direct Mark Hylund to produce, at the next hearing, documents in his possession or control containing twenty original signatures which he acknowledges are his, again, as requested by and for the use stated in (b).

4. With respect to (a), union counsel conceded that section 11(1) of the *Statutory Powers Procedure Act* permits a witness to consult with and be advised by counsel during the course of his testimony. The Board agrees that the *Statutory Powers Procedure Act* disposes of this question in the affirmative. Mark Hylund, as noted, has received copies of the parties' submissions and is directed to be served with a copy of the Board's decision so that he may, if he so chooses, take advantage of that right prior to the next day scheduled for hearing.

5. With respect to (b), assuming (without deciding) that the Board has the authority to give the direction sought, the Board declines to do so given its disposition of (c).

6. With respect to (c), the Board considers that the Board has the authority to grant the direction sought and that it would be appropriate to do so at this time to facilitate the hearing and avoid unnecessary delay. Accordingly, the Board directs Mark Hylund to produce, at the next hearing, documents in his position or control which contain twenty original signatures which he acknowledges are his and which documents are of a nature which could be filed with the Board for the purpose sought by counsel for the union.

7. This matter is referred to the Registrar in accordance with the foregoing. As noted in paragraph 4, a copy of this decision is to be served on Mark Hylund.

46. When the hearing reconvened, Hylund did not, in fact, produce the number of specimen signatures directed, stating that, beyond items like his driver's license which could not be filed with the Board and three items which could be left, he was not in possession of other examples of his signature. The Board did not have to deal further with this point given an undertaking of company counsel to obtain, from the firm employed to handle the company's payroll, sufficient numbers of Hylund's cancelled payroll cheques to accommodate union counsel's request. There were, already, two specimen signatures on the membership card itself and signatures on several other company documents, all of which had been acknowledged by Hylund to be his.

47. Ultimately, the reports of the forensic experts retained by union counsel were filed with the Board and copied to the other parties. There was no dispute that the two, D. Kruger and D. Isherwood, were qualified as experts and the Board so found. Further, the Board noted the position of the other two parties that neither sought to cross-examine the experts on their reports. Accordingly, those reports were tendered in evidence. It should also be noted that no party sought to have Hylund recalled, as the Board in its oral ruling indicated would be permitted, to question him with respect to the final reports.

48. The Board now turns to the evidence, submissions and its decision with respect to the "non-pay" allegation regarding Hylund's membership card. As mentioned earlier, the "non-pay" assumed the added character of an alleged "non-sign" given Hylund's testimony and was, in the union's view, actually a case of a *bona fide* loan from Pikulik to Hylund.

49. The Board has assessed the credibility of the witnesses according to the usual factors. The Board has some specific comments about credibility in the instant case. The Board regards J. Hann as a credible witness who gave his testimony in a straight-forward manner. Likewise, the Board considers R. Pikulik credible. While he was not the most articulate witness, the Board is satisfied he was sincerely trying to recall events occurring months previously. The discrepancies between the testimony of Hann and Pikulik are no more than would be expected given the passage



of time and, while the Board may have concluded one was more accurate on some details than the other, any inconsistencies in their testimony do not warrant a wholesale rejection of their evidence as unreliable or untruthful. In contrast, the Board has no hesitation in concluding that Hylund deliberately did not tell the truth with respect to his testimony that the signature on the receipt portion of the membership card was not his. Because of the Board's view of Hylund's credibility, Hylund's testimony is disregarded wherever it conflicts with Pikulik.

50. Having weighed and assessed the testimony, in the context of the relative credibility of the witnesses, the documentary material, the parties' submissions and what is reasonably probably in the circumstances, the Board makes the following findings of fact.

51. J. Hann was the full-time union official in charge of the organizing drive at the respondent's plant. At an initial meeting with some employees at a local pizza shop, Hann reviewed the card collection process stressing that, with each card, the one dollar application fee must be collected. Hann told the individuals that, whether or not that figure seemed like a joke, the collection of the one dollar was a necessity. Hann also asked the employees present if there was a responsible, reliable long-term employee at the plant who might be interested in assisting the organizing campaign. The name of R. Pikulik surfaced; Hann established contact and met with Pikulik at the union office. At that meeting, Hann reviewed the card collection process with Pikulik explaining the necessity of collecting the one dollar application fee from each card signer. Hann informed Pikulik that this requirement of one dollar was put in place a long time ago and had continued to the present. Hann also said that discretion should be used in approaching employees, that employees should not be intimidated into signing union cards. Cards were returned over a period of time; with respect to each card, Hann reviewed the card and collected the one dollar application fee. On the terminal date, Hann personally delivered those cards in his possession to the Board and filed a Form 9 declaration dated October 24, 1990.

52. Pikulik collected twelve membership cards, including that of Hylund. Pikulik was a long-service employee who became involved with the organizing drive but who was not a main card collector; Pikulik had never before participated in an organizing campaign. Pikulik discussed the union drive with Hylund and asked if Hylund was interested in joining. The discussion was positive. Hylund was a probationary employee at the time. Shortly prior to October 24, 1990, Hylund received a card from Pikulik to complete and return. The necessity of the one dollar application fee was raised. When Hylund returned the card, Pikulik noticed certain information was omitted and other parts of the card were incorrectly or sloppily completed. Pikulik decided the card was unsuitable in its current form to be submitted; the card was ripped up and tossed out. On the afternoon of the terminal date, Pikulik saw Hylund again, asked if Hylund was still interested in joining the union and gave him another card. Pikulik told Hylund that, if he wished to participate in the drive, the card should be completed and returned without delay. In Pikulik's view, Hylund understood what the card represented and was aware the 24th was the terminal date. Pikulik marked with "X" the places on the card where Hylund's signature was required.

53. Hylund did return the card that afternoon. Pikulik added the information "press feeder" where Hylund had not filled in that data. On the receipt portion, Pikulik inserted Hylund's name in printed form, the figure one dollar and signed as collector. Hylund had affixed his signature on all three points shown on the card, including the receipt portion. Pikulik asked Hylund for the one dollar application fee. Hylund understood that one dollar was needed with the card but responded that he did not have one dollar at the time. Pikulik told Hylund he would look after the one dollar fee for now and would "hit (Hylund) later" for the money. Pikulik testified that he understood the importance of the one dollar, that Hylund had to pay the one dollar himself, but believed that Hylund would pay him back. Pikulik testified he simply forgot to specifically ask



Hylund for the money later given the minuscule amount involved. Pikulik added that he regarded the situation like that where one employee gets coffee and another returns the favour on another occasion.

54. As Hylund's card was collected on the terminal date, Pikulik contacted the union for advice and was told to forward the card directly to the Board by registered mail dated October 24. Pikulik did so and the card was included in the membership evidence filed in support of the certification application.

55. Hann spoke to Pikulik by telephone in the late afternoon of October 24, 1990, the terminal date. Pikulik informed Hann that a card had been signed that afternoon and that he (Pikulik) had been advised by the union to forward that card directly to the Board by registered mail and had done so. Pikulik told Hann he received the one dollar fee from Hylund as he (Pikulik) knew the one dollar was important but regarded the one dollar he paid on Hylund's behalf as a matter just between the two of them and that Hylund would pay back the one dollar. Arrangements were made for Hann and Pikulik to meet to collect the one dollar and a photocopy of the card. That meeting occurred a few days later at approximated 5:30 a.m. at a doughnut shop near the plant. The conversation was brief. Hann thanked Pikulik for mailing the card to the Board. Pikulik was asked for the photocopy of the card and the one dollar application fee for that card. By this point, Hann was aware that the card in question was that of Hylund and, to his knowledge, the one dollar was Hylund's. Pikulik did not disclose the one dollar was his own, that Hylund had not paid the fee on his own behalf nor yet repaid the loan. To the best of Hann's recollection, the one dollar was in the form of looney, as it was his usual practice to write the employee's name on the dollar bill if a dollar bill was submitted.

56. Subsequently, Hann filed a second Form 9 with the Board with respect to that one membership card. While Hann could not recall precisely which date the meeting at the doughnut shop occurred, he was certain that the meeting preceded the filing of the Form 9 declaration. Hann testified that the Form 9 declaration attested to the fact the declarant had conducted the necessary checks of the cards and collected the one dollar application fee. In his words, the Form 9 declarant is "putting (his) name on the line", it's evidence that what "you're turning in is true".

57. A first Form 9 was filed with the Board in respect of membership evidence on behalf of sixty-five employees. That Form 9 expressly noted the following items with respect to five of those cards: an error as to the month signed (the 10th not the 9th) on one card; a month and year but no date on one card; and error by the collector as to the date on the receipt on one card; the difference between the dates of application and receipt on one card which had been taken home, filled out and returned the next day; no date on the receipt portion of one card overlooked by the collector. Both Form 9's were disclosed by the Board to the parties although the names of the person signing the five cards referred to were concealed.

58. The Board intends to only briefly summarize the submissions of counsel, particularly since company counsel filed written representations in addition to the cases cited. It should also be mentioned at this point that counsel for the employee objectors informed the Board by letter dated February 11, 1992 that, as his only contact had left the company and the city, counsel did not plan on attending any further hearing dates or on making further submissions. Counsel did not appear when J. Hann testified nor did he make final submissions in these proceedings.

59. Counsel for the union acknowledged that the delays in hearing the instant case were unpredictable, unusual and not attributable to the Board. Counsel emphasized that a representation vote had been conducted and the union won the vote: only subsequent to the vote result were the various allegations and issues raised. In counsel's view, the vote conclusively demonstrated that

the employees wanted to be represented by the applicant and dispersed any cloud over the membership evidence filed in support of the application. Counsel reviewed the chronology of events and the evidence in some detail with respect to Hylund's card, including the reports of the handwriting experts, and the Form 9 declaration regarding that card. Counsel submitted that Hylund's evidence should be entirely disregarded and that the Board should conclude that Hylund indeed signed the receipt portion of the card and the one dollar was a *bona fide* loan from Pikulik to Hylund. That is, Hylund's card should still be counted. In the alternative, only that one card collected by Pikulik need be discounted. In the further alternative, even if all of Pikulik's were disregarded, the union would still be in a vote position and, as a representation vote had already been held, that result should stand and the union should be certified. Counsel argued that there was no basis upon which the reliability of the Form 9 declaration regarding Hylund's card was called into question. In reply, counsel contended that the status of the first Form 9 was never an issue in these proceedings and that document should not be impugned. Cases cited in support: *Frankel Steel Limited*, [1984] OLRB Rep. Jan. 28; *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. April 424; *N.A. Construction*, [1982] OLRB Rep. Jan. 77; *Trent Metals Limited*, [1976] OLRB Rep. Dec. 840; *Calvano Lumber & Trim Co. Ltd.*, [1988] OLRB Rep. Aug. 735; *Sterling Packers Ltd.*, [1972] OLRB Rep. July 705; *Echlin-United of Canada Limited*, [1965] OLRB Rep. May 91; *Dominion General Manufacturing Limited*, [1985] OLRB Rep. Aug. 1187.

60. Counsel for the company asserted that the representation vote had been directed on misinformation, that is, on the assumption of the integrity and honesty of the conduct of the union officials which assumption, it was submitted, was incorrect. Counsel argued that the contradictions between the testimony of Hann and Pikulik meant that one or other was not credible. In either event, the membership evidence was so seriously compromised that the certification application should be dismissed. It was submitted that, in this context, the credibility of Hylund was irrelevant. The testimony was reviewed in considerable detail in support of counsel's fundamental proposition that, in the circumstances, the membership and both Form 9 declarations could not be relied on, and thus, the union was not entitled to a representation vote. Far from cleansing any difficulty with the membership evidence, the vote and its outcome was irrelevant and should be disregarded. In short, the certification application should be dismissed outright. Cases referred to included: *Valley Transportation Company Limited*, [1963] OLRB Rep. Nov. 448; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738; *Estonian Relief Committee in Canada*, [1989] OLRB Rep. May 440; *Laidlaw Wire of Canada Ltd.*, (1958), 58 CLLC ¶18,110; *N. A. Construction*, *supra*; *Laidlaw Wire of Canada Ltd.*, [1985] OLRB Rep. Oct. 1479; *Daltons (1834) Limited*, [1982] OLRB Rep. April 567; *Dough Delight Ltd.*, [1986] OLRB Rep. May 603.

61. Turning first to the "non-sign" allegation, the Board has no hesitation in concluding that Hylund did sign the receipt portion of the card. Nothing further need be said about this question.

62. With respect to the non-pay allegation, the Board intends to sketch the Board's approach to such matters as expressed in the jurisprudence. Given that the Board must rely on the membership cards, a form of hearsay evidence, the Board has consistently demanded the process of card collection and disclosure to the Board in the Form 9 declaration be conducted with integrity and care: *Valley Transportation*, *supra*, *Webster Air Equipment*, *supra*. Where no Form 9 inquiries were made or such inquiries were regarded as fundamentally flawed, the Board has dismissed the application on the basis that the membership cards were entirely unreliable: *National Steel Car*, *supra*; *Estonian Relief Committee*, *supra*. Likewise, where the overwhelming majority of the cards were collected by two in-plant organizers who deliberately mislead the Form 9 declarant, the Board was not satisfied any of the cards filed by those collectors were reliable and the application was dismissed: *Dough Delight*, *supra*.



63. Not all “irregularities” have resulted in the outright dismissal of the certification application. The Board has traditionally had regard to factors such as the nature of the irregularity, the identity of the offender, whether the matter was isolated or reflected a pattern of misconduct and whether the irregularity was a simple error or deliberate. The fundamental issue for the Board in each case is whether the memberships cards are a reliable indicator of employee support for the applicant. The Board’s response in each case reflects the Board’s assessment of the degree of impropriety and the consequent impact upon the reliability of the membership cards. Where the Form 9 declaration was untainted but the one dollar membership fee was paid by another person to the collector’s knowledge and without any intention to repay the money, those specific cards were disregarded: *N.A. Construction, supra*; *Sandercock Construction Limited*, [1970] OLRB Rep. April 147. In contrast, where the one dollar payment was properly characterized as a “*bona fide* loan” and an isolated occurrence by an inexperienced in-plant organizer, the card has counted: *Dominion General Manufacturing, supra*. The occasional borrowing of one dollar from a fellow employee has generally not been of great concern to the Board: *Calvano Lumber, supra* and the cases cited therein: *Laidlaw Wire, supra*. The Board has regarded more seriously an irregularity committed by a union official than that of an in-plant organizer and a pattern of misconduct more seriously than an isolated occurrence: *Frankel Steel, supra*; *Laidlaw Wire, supra*. The debate for the Board has sometimes focused on whether the irregularity is such that only the specific tainted card or all cards of a collector should be disregarded and, in resolving that, the Board has considered whether the collector sought deliberately to mislead the Form 9 declarant or the Board: *Daltons (1834) Limited, supra*. Where the Board concludes that the membership evidence should not be entirely discounted but is “under a cloud”, the Board has directed a representation vote to dispel any lingering suspicion about the level of membership support enjoyed by the applicant: *Crock & Block Restaurant, supra*, *Echlin-United, supra*; *Hydro-Electric Commission of Hamilton*, 58 CLLC ¶18,120. The Board throughout is motivated, not by an intention to punish, but by concern with the reliability or otherwise of the membership evidence: *Crock & Block, supra*; *Inco Limited*, [1966] OLRB Rep. Jan. 698.

64. What are the circumstances in the instant case? Pikulik was a rank and file, in-plant organizer without any prior experience in organizing campaigns. He was not one of the primary organizers and collected only twelve cards (of sixty-six). Pikulik acknowledged he knew the importance of collecting the one dollar application fee from each card signer. Pikulik gave his testimony in a candid, straightforward manner and there is no cogent evidence suggesting the payment on behalf of Hylund was other than a single, isolated occurrence. Pikulik testified that he believed that Hylund would repay the one dollar but forgot about the matter afterwards because of the minimal amount of money involved. The Board accepts that explanation as truthful. In this regard, the Board echoes the sentiments expressed in *Calvano Lumber, supra*. Pikulik did not disclose the one dollar “loan” to Hann because that was viewed as a private matter between him and Pikulik and Hylund would repay the money. It cannot be said that Pikulik took his duties as a collector lightly. Pikulik destroyed Hylund’s first card as incomplete and sloppy. That conduct is not consistent with a casual, non-caring attitude or the “buying of memberships”. In short, the Board sees no reason to regard Pikulik’s loan as other than *bona fide*; that card, and the rest of Pikulik’s cards, should not be disregarded. The Board is not condoning the “loan” between Pikulik and Hylund. Each departure from the “straight and narrow” may well subject the applicant to costly and lengthy litigation and carries the risk that the application may be dismissed in its entirety. In the instant case, the Board is satisfied the card is reliable.

65. The Board would note that, even if Hylund’s card was discounted, the applicant would still have sufficient membership support to be entitled to a representation vote. There is nothing in the instant case which would persuade the Board that the remaining cards collected by Pikulik should be disregarded. A vote has already been held and the union established majority support



amongst the members of the bargaining unit. That is an event to which the Board returns *infra*. The Form 9 declaration, nonetheless, must also be scrutinized in these circumstances.

66. Is Hann's conduct culpable so as to discredit the Form 9 declarations on which the Board relies? In the Board's view, no. Hann reviewed the organizing process with all the collectors, including Pikulik, at the commencement of the organizing drive and emphasized the importance of the one dollar application fee notwithstanding its minimal monetary value. As the cards were returned, Hann checked the cards and reviewed the cards and the one dollar with the collector. In a telephone conversation, Pikulik told Hann he collected the one dollar from Hylund; at their subsequent meeting, Hann obtained the money and the photocopy of the card (the original had already been sent to the Board). In the circumstances, the Board is satisfied Hann made the proper inquiries. Hann testified that he understood the importance of the Form 9, that he was "putting (his) name on the line" in attesting to the integrity of the membership cards. In this instance, there were two "Form 9's", both signed by Hann. The first dealt with all the cards but Hylund's; the second with Hylund's alone. There were no allegations of impropriety raised against any of the cards addressed by that first Form 9. Further, the first Form 9 expressly commented with respect to minor errors on a total of five cards. In the Board's view, there is no cogent evidence in the circumstances to impugn the first Form 9 declaration. Moreover, the detail of the first disclosures also lend support to the Board's view that the second Form 9 is not tainted. The second Form 9 was completed following Hann's meeting and phone conversation with Pikulik. Taken together, the Board is satisfied Hann made the proper inquiries of Pikulik; Pikulik simply did not disclose the loan.

67. The instant case is unusual because of the various events and issues which could not have been anticipated but, even more so, because this lengthy and costly litigation has been conducted in the shadow of a representation vote wherein the applicant established the majority support needed for certification. The Board has already mentioned instances where, when the membership evidence was held to be "under a cloud", a representation vote was seen as the appropriate mechanism to "clear the air". In its reasoning thus far, the Board has focused on the various issues themselves and has ignored, in that analysis, the over-arching fact that a representation vote was conducted and won by the applicant. In the Board's view, where a representation vote has been directed, particularly where the vote was agreed to by the parties, it is implicit that the parties would ordinarily be bound by the results of that vote, apart from situations wherein improprieties are alleged with respect to the vote itself. Where non-pay or non-sign allegations are raised subsequent to the vote, and the Board's usual inquiry triggered by such allegations would otherwise result in the Board's decision to list the matter for hearing that, the Board may well insist that it be satisfied in a show cause hearing, in all the circumstances, the inquiry ought to proceed further.

68. For the foregoing reasons, the Board, in its decision dated March 5, 1992 certified the applicant as bargaining agent for the employees of the respondent in the bargaining unit described therein.

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**4176-91-R** Can Workers Federal Union Local 354, Canadian Labour Congress, Applicant v. **St. Catharines Hydro Electric Commission**, Respondent v. International Brotherhood of Electrical Workers, Local 636, Intervener.

**Certification - Trade Union - Employees not meeting eligibility requirements of union's constitution - Union not having established practice of admitting persons to membership without regard to eligibility requirements of constitution - Application dismissed**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *D. A. Patterson*.

**APPEARANCES:** *Doug West* and *Maureen Kirincic* for the applicant; *Joseph Liberman* and *Dave Chondon*, for the respondent; *Bernard Fishbein* and *J. R. Wachoski*, for the intervener.

**DECISION OF THE BOARD;** May 29, 1992

1. This is an application for certification in which a pre-hearing representation vote was directed, and the ballot boxes sealed, pending the direction of the Board. A hearing was scheduled to consider the issue of whether the applicant was a "trade union" within the meaning of the Act, since it had not previously proved such status before the Board, and whether the provisions of section 105(4) (formerly section 103(4)) of the Act precluded the certification of the applicant. In addition, at the hearing, an issue arose as to whether the membership cards relied upon by the applicant correctly identified the name of the applicant.

2. The Board first dealt with the issue arising with respect to the provisions of section 105(4) of the Act, which reads as follows:

(4) Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

3. At the conclusion of the hearing into this matter, the Board delivered the following oral decision:

1. The applicant, prior to the instant application, has only admitted to membership employees of Ball Packaging Products Canada, Inc. Its constitution requires that those eligible for membership be employees of this company.

2. Here, the employees in question are not employees of Ball Packaging, but rather are employees of the respondent before us, the St. Catharines Hydro Electric Commission.

3. It was acknowledged in submissions that the instant application would be the beginning for the applicant of a practice of admitting members other than according to the constitutional eligibility requirements of its own constitution. It was clear that there had not been an "established practice of admitting persons to membership without regard to the eligibility requirements of the [applicant's] constitution".

4. Section 105(4) of the Act requires that the Board consider, in determining whether someone is a member of a union whether the employee can meet the eligibility requirements of the union's constitution, unless the union has an established practice otherwise. As noted, there is no established practice otherwise by the applicant. Nor is there any real dispute that the employees in this application did not meet the eligibility requirements of the constitution of the applicant.

5. Therefore, as required by the *Labour Relations Act* itself, and given the decision of the Supreme Court of Canada in *Metropolitan Life Insurance Company* (1970) 11 DLR(3d)336, these employees cannot be considered by the Board as members of the applicant. In this respect, see, for example, *Central Hospital* [1982] OLRB Rep. Apr. 528.

6. This certification application must therefore be dismissed.

7. In light of this decision, we need not deal with whether the applicant is a "trade union" within the meaning of the Act, or whether the membership evidence filed before the Board is deficient in any respect.

8. Accordingly, the application is dismissed.

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**2929-91-U Eugene Deseire Solomon, Complainant v. Retail, Wholesale and Department Store Union, Respondent.**

**Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Union filing lengthy reply to employee's complaint and asking that it be dismissed without a hearing on a number of grounds - Complainant directed to respond to union's reply and to address certain concerns raised in complaint within 30 days**

**BEFORE:** *Bram Herlich*, Vice-Chair.

**DECISION OF THE BOARD;** May 25, 1992

1. This is a complaint alleging violation of section 69 [formerly section 68] of the *Labour Relations Act*.

2. Although this complaint was filed on December 3, 1991, it would appear to be related to an earlier complaint (Board File 2177-87-U) filed in November of 1987.

3. That complaint related to the respondent's handling of Mr. Solomon's grievance. A brief history of what appear to be undisputed facts and of the course and disposition of that complaint will be of some assistance. The complainant's discharge from employment was the subject of a grievance which was referred to arbitration. Prior to arbitration he was reinstated and consequently the only issue at the arbitration hearing was compensation for the period between his discharge and reinstatement. The arbitration hearing was held on October 20, 1987 and culminated in a unanimous decision of the Board of Arbitration dismissing the claim for compensation. The complaint in Board File 2177-87-U was filed November 6, 1987. On March 8, 1987, the day scheduled for hearing in that complaint, the parties executed an agreement which resulted in a Board decision adjourning the matter *sine die* for a period not to exceed one year.

4. Essentially, the parties executed a document which evidences an agreement to adjourn the matter to allow the respondent union to secure a legal opinion regarding the merits of an application for judicial review of the arbitration award. The document further stipulated that if the union were to seek judicial review of the arbitration award the complaint would be withdrawn.

5. As the union did decide to pursue an application for judicial review, the complainant's then counsel wrote to the Board advising that the matter was now settled and seeking leave of the



Board to withdraw the complaint. By decision dated July 25, 1988, the complaint was consequently withdrawn by leave of the Board.

6. The judicial review application was heard on February 28, 1990. The Court unanimously dismissed the application.

7. By letter dated April 16, 1990, the complainant sought to have his complaint relisted for hearing by the Board. The union opposed that request but, subsequently and without prejudice to its position, agreed to the complainant's request for an adjournment for health related reasons. Consequently, on agreement of the parties, the matter was once again adjourned *sine die* for a period not to exceed one year by a Board decision dated June 15, 1990.

8. By decision dated April 2, 1991, the Board dismissed the complainant's subsequent request for an "extension of time". In that decision the Board directed the complainant to fulfill certain conditions in the event he wished to pursue his request for reconsideration of the Board's decision withdrawing his complaint.

9. By decision dated July 9, 1991 (i.e. shortly after the end of the one year period contemplated in its decision of June 15, 1990) the Board, after finding that the complainant had not responded to its directions, concluded as follows:

5. No doubt the complainant still feels aggrieved by his dismissal, the actions of his employer, the way in which the union represented him, the dismissal of his grievance by an arbitration board, and the failure of the Divisional Court to intervene. Nevertheless, having reviewed the history of this complaint we are not prepared to reopen it or extend the time to make any further submissions. The Board has a discretion to entertain any section 89 complaint and in the circumstances of this case it is not prepared to further entertain this one. The case was and remains closed.

10. On December 3, 1991, the present complaint was filed. Without reviewing the complaint in detail it is sufficient to say that the complaint appears to relate principally, though not necessarily exclusively, to the respondent's handling of the judicial review application heard some 21 months prior to the filing of this complaint.

11. The respondent has filed a lengthy reply and asks that the complaint be dismissed without a hearing on a number of grounds including:

- (i) It does not make out the *prima facie* case for the remedy requested pursuant to section 71 of the Board's Rules of Procedure because it does not disclose any violation of the *Labour Relations Act*;
- (ii) It is *res judicata*;
- (iii) It is an abuse of the Board's process; and
- (iv) it has been filed, in the circumstances, with an inordinate and inexcusable delay and the Board ought not to exercise its discretion to entertain it.

12. Before the Board decides whether to list this matter for hearing (at least with respect to the preliminary objections raised by the respondent) or to dismiss the complaint without a hearing, it would be appropriate to allow the complainant to respond to the union's reply and to address certain concerns raised in the complaint.

13. Accordingly, the complainant is directed to do the following within 30 days of the date of this decision:

- (i) to provide full and complete written particulars of the present complaint outlining in detail *each* and *every* act or omission of the trade union alleged to be in violation of section 69 [formerly 68] of the *Labour Relations Act*;
- (ii) to the extent that the present complaint involves matters that could or should have been the subject of the previous complaint (Board File 2177-87-U) show cause, in writing, as to why he should be permitted to raise those issues in the context of the present complaint;
- (iii) to the extent that the present complaint deals with the union's handling of the judicial review proceeding, show cause, in writing, as to why the Board should exercise its discretion to entertain this complaint filed some twenty-one months after the events in question;
- (iv) to provide, in writing, full details of the remedy the complainant seeks. In this context we note that the complaint as filed seeks:

“that a new fair and proper application be made, by the Retail, Wholesale & Department Store Union, for Judicial Review, of File No. 2177-87-U being the Ontario Labour Relations Board File number, Otherwise that this complaint come up for hearing again at the Ontario Relations Board [sic];”

- (a) to the extent that the complainant seeks an order that the Judicial Review application be heard again, the complainant is directed to show cause, in writing, as to where the Board might find the jurisdiction to direct the Divisional Court to rehear a matter already heard and decided;
- (b) to the extent that the complainant is seeking that the Board re-hear File 2177-87-U the complainant is directed to show cause as to why the Board ought to, as a remedy in this complaint, direct that another matter already decided by the Board be reheard. In particular, the complainant should address the issue of why such an approach is to be preferred to the more conventional route of an application for reconsideration (in this case of the decision in Board File 2177-87-U).

14. All of the above submissions are to be filed with the Board with copies to the union within 30 days of the date of this decision.

15. In the absence of any further submissions from the complainant the Board may make a further decision, which could include dismissing the complaint, on the basis of the material already before it.

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**3252-91-FC; 3253-91-FC The Ontario Public Service Employees Union, Applicant  
v. Surex Community Services, Respondent**

**Adjournment - First Contract Arbitration - *Hospital Labour Disputes Arbitration Act* - Practice and Procedure - Subsequent to union's application for direction of first contract by arbitration, union applying under *HLDA* for arbitration of dispute - Employer taking position that it is not a "hospital" within meaning of *HLDA* - Minister of Labour, as of date of Board proceeding, not having determined whether or not employer a "hospital" - Board rejecting argument that union's application under *HLDA* warranting dismissal of first contract application for abuse of process - Board adjourning first contract application pending Minister's decision**

**BEFORE:** K. G. O'Neil, Vice-Chair, and Board Members J. A. Ronson and C. McDonald.

**APPEARANCES:** Chris G. Paliare, Lily Harmer and Leon Farley for the applicant; D. Churchill-Smith, J. A. Roffey and C. Hamilton for the respondent.

**DECISION OF THE BOARD;** May 25, 1992

1. These are two related applications for direction of settlement of a first collective agreement by arbitration. The applications were made on January 14, 1992 and were first scheduled for hearing on January 27, 29 and February 7, 1992. On consent of the parties those dates were adjourned, the time limits in section 41(2) were waived, and an extension agreed to under section 41(19) of the Act. The matter was rescheduled for April 24, 28 and June 17, 1992 to allow the parties to engage in mediation which was unsuccessful. When the matter came back on for hearing on April 24, 1992, the Board was advised that the applicant union had applied under the *Hospital Labour Disputes Arbitration Act* ("HLDA") for arbitration of their dispute, asserting that the respondent is a hospital within the terms of that legislation. The employer takes the position that it is not a hospital and says that because of the HLDA application, we should not entertain the first contract application at all and certainly not at this time. The Board consulted the Registrar for dates and ascertained that there were dates that would make it possible for the matter to be completed in the vicinity of the June 17 date which had previously been scheduled and adjourned the matter to June 12, 17, 30, July 6, 7, and 8. Our reasons for so doing follow.

2. The respondent is a non-profit, charitable corporation which provides residential, educational and developmental services for the developmentally handicapped. The applicant union was certified to represent the full-time and part-time employees of the respondent on March 25, 1991. Notice to bargain was served on May 13, 1991. Collective bargaining commenced in June and six or seven meetings were held. On October 21, 1991 a conciliation application was filed by the union. A conciliation meeting was held on December 19, 1991 and on December 31, 1991 a "no-board" report was issued by the Minister. On January 14, 1992 this application was made.

3. The legislative scheme relating to hospitals is different than that of the *Labour Relations Act* in regards to the settlement of disputes over the contents of the collective agreement, known as interest disputes. Under the *Labour Relations Act*, if a conciliation officer is unable to effect a collective agreement, the Minister either appoints a conciliation board or issues a notice in writing that he does not consider it advisable to do so, commonly known as a "no-board" report. The date of report of the conciliation board or, more commonly, of the "no-board" report then starts the time running for the timeliness of an application such as this one, for direction of settlement of a first collective agreement by arbitration, as for other matters under the Act, such as a legal strike or lock-out, certification and termination applications. By contrast under the *Hospital Labour Dis-*



puts *Arbitration Act*, where a conciliation officer is unable to effect a collective agreement (whether a first collective agreement or a subsequent one), the Minister informs the parties in writing and the matters in dispute between the parties are then decided by interest arbitration. (See section 3 and 4 of the HLDAA.) Strikes and lock-outs are not permitted. In sum, these are parallel, mutually exclusive, schemes for settling the first collective agreement between these parties.

4. The respondent takes the position that the union has now elected to go to the Minister of Labour under the HLDAA and should be obliged to follow that course of action. Counsel states that the union's attempt to follow a double route is an abuse of process and that because of the intolerable position this puts the employer in, we should dismiss the application. However, in the alternative, the employer submits we should defer to the HLDAA application. He observes that pursuing the two arbitration routes could well result in inconsistent results and the waste of many taxpayers' dollars. Counsel submits that if the respondent is not a hospital, the parties should go back to collective bargaining and that if it is a hospital, the dispute must go to arbitration under the HLDAA.

5. For the union, counsel argued that the respondent ought to be estopped from objecting because of the lateness of the request and referred to *Regency Towers*, 4 LAC (2d) 440. Further, counsel says nothing precludes the union from pursuing two courses of action. He asserts that there is nothing to prohibit the Board from continuing and that policy reasons do not indicate that it ought to stop this proceeding.

6. In reply, employer counsel rejected the suggestion that it is estopped and asserted that his point is a jurisdictional point. He observed that whatever the Board would do in this matter would have no finality and referred to the case of *Nel-Gor Castle Rest Home and London and District Service Workers, Local 220* (1985), 85 CLLC 12,029. In that case, the Court was hearing an application for an order staying an arbitration under the HLDAA pending an application for judicial review of a Minister's decision that the respondent was a hospital. As it was the first collective agreement between the parties that was in issue, the Court found that the balance of convenience was in favour of determining whether the applicant was a hospital before the arbitration proceeded so that the parties could know what statutes governed their relationship.

7. Whether or not to defer to the process under the HLDAA at this stage of the proceedings is a matter in the Board's discretion. We are not currently without jurisdiction to proceed as there has been no determination that the respondent is a hospital. We are not of the view that the union's application under HLDAA warrants the dismissal of this application for abuse of process. Rather, we decided the interests of both sides could best be served by adjourning the matter and did so on April 24, 1992. Given the original estimate that it would take three days to complete the matter, the overwhelming balance of convenience favoured the adjournment to the dates that were available around the previously set June date. This is because the matter could be finished in approximately the same time frame and the possibility existed that the Minister's decision would be available prior to the next scheduled date. The question remaining however, is whether the matter should proceed on June 11 in the event that the Minister has not yet released its decision. If the Minister has released a decision that the respondent is not a hospital it is clear that the matter should proceed on June 11. If the decision is that the respondent is a hospital, the June 11 hearing should not proceed. The union has undertaken to withdrawn the application in that event.

8. We have considered the union's argument that the employer has waived its right to object or is estopped from so doing. We do not agree that the facts support such a conclusion. There was no evidence that the employer had made any representation as a basis for the estoppel. Even if there were, it is doubtful that the detrimental reliance necessary to support an estoppel is

present here. Although it is true that some arrangement might have been possible had the employer raised the matter earlier, this is not a detriment akin to those in the cases on waiver or estoppel, including *Regency Towers, supra*. It is not the loss of an opportunity to satisfy a legal requirement, the loss of a right, or even the loss of an opportunity to raise something in collective bargaining that is at issue here. Nor is it akin to waiver of a defect in a grievance by treating it on its merits subsequent to the defect for example, by making submissions to the Minister on the HLDAA application. It is at most a postponement of the union's right to pursue its rights under the *Labour Relations Act* or the HLDAA.

9. We are not aware of any decision of the Board directly on point in this unusual set of circumstances. Normally, an application under section 41 is handled in the most expeditious manner possible because of the legislative intention for speed that is expressed in the time limits in that section. However, and obviously, in the absence of good reason, it is not advisable to embark upon a proceeding, especially a lengthy one as this may be, which could well be a nullity. In considering this matter, we note that it is the applicant that is the author of the current situation. It waited almost 11 months after certification to have the matter of the respondent's status under the HLDAA determined. Where it is the applicant who has changed its view of the appropriate governing legislation after having filed the section 41 application, we do not think the factor of expedition in hearing the section 41 application should weigh as heavily as it otherwise would.

10. This matter was originally estimated to take three days to hear. At the hearing of this matter in April, employer counsel was of the view that it could take considerably longer than that. Several days of hearings represent a considerable investment of public and private resources in themselves, beyond what has already been spent in preparation of this matter. Adversarial proceedings of any kind are not necessarily helpful to a collective bargaining relationship, even the most mature one, especially if they turn out to have been for nought. In the circumstances of this case, we do not see sufficient reason to embark on a hearing that may be a nullity. Different considerations might well apply if the Board had started the hearings, or there were other countervailing factors not present here.

11. We are not aware of when the decision by the Minister on the status of the respondent as a hospital will be made or released but the parties' submissions to the Minister on this question had been finished on April 17, 1992, a week before the hearing convened before this panel. The union expressed optimism that the decision would be available before June 17, 1992, the date then set to finish the matter.

12. For the above reasons the matter is adjourned until June 12, contingent upon the Minister's decision being released by that date, unless the application is withdrawn by the union before then. If the Minister's decision is not released by that date, but is released prior to any of the other dates, the matter will commence on the first of those additional dates not yet passed (June 17, 30, July 6, 7 and 8) and continue on whatever other of those dates remain.

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**1491-91-U; 1492-91-U** Energy and Chemical Workers Union, Local 593, Applicant v. **Union Carbide Canada Limited**, Respondent; Energy and Chemical Workers Union, Local 593, Complainant v. **Union Carbide Canada Limited**, Respondent v. Group of Employees, Interested Party

**Duty to Bargain in Good Faith - Lock-Out - Remedies - Unfair Labour Practice - Employer agreeing to voluntarily recognize union at new location so long as union prepared to enter into separate collective agreement for that location - Union rejecting employer position and filing complaint at Board - Board finding and declaring that existing collective agreement encompassing new location and that staffing and subsequent operation of new location governed by collective agreement - Board directing that any continuing dispute regarding application of agreement be determined through arbitration and directing parties to waive time limits - Board also finding that employer breached its duty to bargain in good faith in preceding round of negotiations by passing on incomplete and misleading information regarding relocation of employer operations**

**BEFORE:** *M. G. Mitchnick*, Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

**APPEARANCES:** *Daniel Ublansky*, *Carol Fraser*, *John Macdonald* and *Rick Bauer* for the applicant/complainant; *F. G. Hamilton*, *Q.C.* and *Rod Sanders* for the respondent; *James K. Bonus* and *Barry (Douglas) Burnell* for the interested party.

**DECISION OF THE CHAIR, M. G. MITCHNICK, AND BOARD MEMBER H. PEACOCK;** May 29, 1992

1. This matter involves an application for a declaration of unlawful lock-out under section 95 of the *Labour Relations Act* (formerly section 93), together with a section 91 (formerly section 89) complaint alleging a contravention of sections 15, 50, 51, 65, 67, 71 and 74 (formerly sections 15, 49, 50, 64, 66, 70 and 72) of the Act. The Union that is the applicant/complainant was and is bargaining agent for employees at a plant belonging to the respondent employer in Oakville, and the essence of the complaint is that the respondent threatened to move part of its operation at that facility, being the Packaged Gas plant, to a new location not covered by the collective agreement if the Union and members of the bargaining unit did not agree to changes to their current agreement. The Union did not agree to those changes, and that operation did ultimately move. The Union also claims that the respondent's failure to disclose the state of its thinking with respect to such a move during the round of negotiations that immediately preceded the announcement of the move constituted a failure to bargain in good faith.

2. Because of the view the Board ultimately takes of this matter, the material facts may be set out in a relatively distilled way. In fact, pivotal to the position the parties took in their face-to-face "negotiations" surrounding the move, as well as to their positions before the Board, is the issue of whether the parties' existing collective agreement continued to cover the severed part of the business even *after* its relocation, given that that relocation was to a site within the same town as the existing plant. The Scope or "Recognition" clause of that existing collective agreement provides:

- 2:01 The Company recognizes the Union as the sole and exclusive bargaining agency for employees in a bargaining unit to which this Agreement applies, composed of all employees at its plant in Oakville, save and except foremen, persons above the rank of foremen, technicians and those above the rank in the Specialty Gases Department, students employed during the school vacation period, (from April 15th to and including the Friday following the Labour Day Holiday) office and sales staff.



The term "employee" as used herein means all employees represented by the Union as above defined.

With some minor irrelevant changes over the years, that description of the bargaining unit mirrors a certificate granted to the Union by the Board in 1970. The description is not in the terms most commonly used by this Board, from a geographic point of view, and the decision of the Board accompanying the certificate indicates that it was adopted by the Board having regard to the agreement of the parties. Also raised by the Union on this point of the agreement's coverage is Article 3 of the collective agreement, which provides:

3:01 The Union understands and agrees to recognize that the function of managing and operating the Plant shall rest solely with the Company including but not limited to the hiring and directing of the work force, the determination of the number of employees required to fill the various job classifications, the right to promote, demote, transfer, discipline, suspend and discharge employees for just cause; the determination of the qualifications of an employee to perform work; the location of the Plant or Plants; the type and quantity of products; the methods, processes and means of manufacturing; the making, publication and enforcement of rules for the promotion of safety, efficiency and discipline and for the protection of the employees and the Company's plant, equipment, products and operations.

The exercise of these functions shall be consistent with the terms and provisions of this Agreement and wherever they are inconsistent, an employee will have the right to file a grievance.

3. It is common ground between the parties that the respondent had one location only within the limits of Oakville at the time of the certification, and that was at 2393 Speers Road. The Speers Road property itself is made up of a number of separate buildings, all being encompassed within a perimeter fence, and with access controlled through a gatehouse. The facility is operated by the Industrial Gases Division of Union Carbide, originally known as the Linde Division, and since January of 1992 separately incorporated as Linde Canada Inc.. The site includes an Air Separation or "production" plant, which manufactures the base products of oxygen, nitrogen and argon, a "Packaged Gas" plant or facility for the filling of high-pressure cylinders using those gases, a "Specialty Gas" Lab, which produces special mixes of the gases, and a Transport and Distribution Centre which houses the drivers and the Dryox servicemen (who install and service storage tanks at the customer sites). Another aspect of the Industrial Gases Division involves hydrogen gas, but that has never been associated with the Speers Road production facility. Rather, the company until 1982 had always purchased its hydrogen product directly from facilities operated by its competitors in Oakville and Hamilton. In 1982, however, the company opened a Hydrogen plant of its own, at 3361 Rebecca Street in the Town of Oakville, drawing on and purifying the hydrogen stream emanating as a by-product from the nearby Petrocanada refinery. There originally were two salaried operators involved for the staffing of that new plant, and that later became four. While located some distance apart, there has always been regular contact between Speers Road personnel and the Rebecca Street plant, with the former performing occasional service work there, and the Speers Road trucking fleet being used to pick up and deliver trailers for the Rebecca Street site. There have on occasion in fact been grievances arising out of some of that interface, and there is no doubt that the Union and employees generally were aware of the existence of the Rebecca Street plant. Until the events about to be described, however, there was never any suggestion by the Union that this new Hydrogen plant was within the contemplated scope of the existing collective agreement.

4. That collective agreement had an expiry date of February 28th, 1991, and on February 20th the parties met to open the negotiations for its renewal. The parties had, in the immediately

preceding round, agreed on a new article in the collective agreement, dealing with “Plant Closure”, which provided:

20:01 In the event of a total plant closure:

1. The Company shall notify the Union at least three (3) months prior to the cessation of operations.
2. Following such notifications, the Union shall have the opportunity to discuss and explore with the Company any possible means of averting the closure.
3. If attempts to avert the closure are not successful, Union and Company representatives shall meet to discuss the manner in which the closure is carried out, with consideration to such things as re-location, re-training, methods of payment, job-market assistance and retirement options.
4. In the event of termination caused by the permanent shutdown of the Oakville facility, affected employees with less than five (5) years of company credit service, will be paid according to the Lay-off allowance provisions of the Contract.

Affected employees with 5 or more years of company service credits will receive one week's pay for each year of service to a maximum of twenty-six (26) weeks. There shall be no duplicating of pyramiding of severance/lay-off payments required by the Contract or Employment Standards legislation.

5. In the event of the death of an employee during the formal notice period - all severance pay shall be paid to the estate of the employee.

In the 1991 renewal negotiations, the Union tabled a proposal to enhance those protections, essentially by extending it to include “partial” plant closures, by extending the notification period to the Union, by changing “discuss” in paragraph 3 to “negotiate”, and by augmenting the severance-pay provisions. The Unit chairperson, Gord Harvey, had in fact been apprised of a rumour from one of the drivers that the company was going to move the drivers and servicemen to Mississauga, and Mr. Harvey advised the member at the time that he would raise that matter specifically with the company in bargaining. Mr. Harvey did so, at the outset of his opening remarks, asking about that particular rumour, and then going on more broadly to ask if the company had any plans to move any other part of the plant, or the whole plant itself. According to Mr. Harvey, Rod Sanders, National Human Resources Manager for Linde and spokesperson for the company at the bargaining table, responded that “there were always studies underway”, and that if any decisions were made, the Union would be advised. There is some dispute in the parties' evidence as to whether anything was said beyond that, Mr. Harvey testifying that Mr. Sanders added words to the effect that given the economic circumstances of the company, there was not likely to be anything come of it. The company's witnesses deny that any such thing was added. Mr. Harvey also testified that the matter came up again a number of times subsequently, with the same statements again being made by Mr. Sanders. The company's evidence is that the subject never was raised again. For the purpose of our decision in this matter, we are prepared to act on the basis of the company's evidence. The Union's proposal for changes to the Plant Closure clause remained on the table, in any event, almost to the very end of negotiations, disappearing only in the final stages of a deal being reached at the conciliation meeting which concluded the negotiations on March 20th.

5. Mr. Sanders himself, according to the company's evidence, heard nothing more about any plans for a move until the middle of May, when he was advised by Linde's General Operations Manager in Canada, Alec Johnston, that a Lease Proposal had been submitted to Union Carbide's



Head Office in Danbury, Connecticut for the purpose of moving the “Packaged Gas” operation to a new facility, most likely at a site in Oakville. A meeting took place involving both Mr. Johnston and Mr. Sanders, together with other management personnel and outside legal counsel, to explore the human-resource and labour relations ramifications of the planned move. One of the focal points of the discussion was the question whether, given the likelihood of the move being to a location within Oakville itself, the scope clause of the Union’s existing collective agreement applied. Mr. Sanders testified that that was the position they expected the Union would take, but that on the strength of the history with the Rebecca St. plant, the company at the end of the meeting was satisfied with the position that the collective agreement applied only to Speers Road. It was also decided at the meeting, however, that the company would offer to “voluntarily recognize” the Union at the new location, wherever it might be, so long as the Union was prepared to enter into a *separate* collective agreement for that new location, which would contain the changes the company felt it needed to fit within the concept of the new technology being introduced, and the operational direction, involving closer identification with the individual businesses, that the company sought to move in. After reviewing the existing collective agreement in detail, Mr. Sanders and his staff put together a list of the changes that would be needed, including the collapsing of the existing non-maintenance classifications into one, multi-skilled position called a Cylinder Processor, at a rate that on the whole compared favourably with what the current classifications were currently paying, and for which all of the employees would be given the necessary training. The other major change, consistent with the company’s philosophy and its insistence on a separate collective agreement, would be with respect to senioritybumping rights; during the initial transition period employees would have the right to exercise their seniority at either location, but once that was done the seniority lists under each of the two collective agreements would be strictly separate and non-applicable to the other location.

6. It was decided that June 14th would be the day that the company would make the announcement to the employees at the plant, and Mr. Sanders arranged to meet the day prior with the Union’s staff representative, Carol Fraser, to apprise her of the details in advance. Mr. Sanders at that meeting with Ms. Fraser began by outlining the difficult financial circumstances under which the company was operating. Mr. Sanders testified that he advised Ms. Fraser that the Canadian Head Office in Toronto had been given a directive by Danbury to achieve a 20 per cent return on investment, rather than the 7 or 8 per cent that had been achieved in recent years. Mr. Sanders noted to Ms. Fraser as well that the company had just finished divesting itself of its Packaged Gas business in the United States, breaking it up and selling it off to employee-owned local companies. He then advised her that the Packaged Gas operation at Oakville would not be closed down, but rather that it was going to be relocated to a new site, probably still in Oakville. Mr. Sanders went on to say that the company was prepared to extend the Union’s certification to the new location, as long as the parties were able to come up with an acceptable agreement. Mr. Sanders testified that Ms. Fraser expressed her relief that she was not being faced with yet another plant closure, and indicated that she was not surprised at the development, given Mr. Sanders’ reference to studies during the negotiations. The meeting then simply ended with the discussion of a timetable for meeting with the Union committee. The next day the company held its meetings with the employee groups as planned, and Mr. Johnston read out the following prepared text:

I called this meeting today to announce that effective with September 30th, the Company will be relocating its Packaged Gas Operations to a new location, in all probability within Oakville. At this facility, the Company will be operating an initial two-shift operation using new computerized cylinder filling technology and equipment, along with more efficient methods of cylinder handling. The product line to be covered here will include mixes and pure gases. The Specialty Gas Lab, Transportation and Customer Service and Production operations will remain at Speers Road.



As a result of anticipated productivity gains with the new technology and work process we are investigating expanding into other product lines.

With this new technology and approach, there will be a reduction of personnel - it is anticipated that the new facility will be manned by 18 - 20 hourly staff on an initial two-shift basis. This means that at various stages through the transition layoffs will occur. Layoffs will be done according to the collective agreement.

Since this approach will radically affect the way we do business for some people in Specialty Gas and the Packaged Gas Operations, the Company will be sitting down with your Union as soon as possible to discuss the changes. The intent being, is to let everyone affected have as good an idea as possible as to how and when this will impact on them.

We recognize the serious implication this will have on some of you at this facility. We can assure you that our decision to implement change was not taken lightly. However, it will mean a major improvement in our overall competitive position and that will be a benefit to those employees remaining.

7. From there the company and Union moved swiftly into a series of meetings set up to attempt to arrive at terms and conditions of employment that would apply at the new location. The company went through the list of changes that it had prepared, but made it clear that fundamental to its position was recognition of the fact that the two locations would henceforward be covered by *separate* collective agreements. From the outset, however, it was apparent that the employee committee, led by Mr. Harvey, were simply not buying that. Rather, Mr. Harvey made reference immediately to the existing agreement's Recognition clause, and kept pressing Mr. Sanders for a satisfactory explanation why all of the changes the company felt it needed from an operational point of view could not be accomplished within the parameters of the existing collective agreement. Mr. Sanders repeatedly tried to impress upon the committee that if it was decided not to relocate within Oakville and no new collective agreement was reached with the Union, there might be *no* jobs for any of the existing employees at the new facility. Eventually, however, all that was agreed was that the company would reduce its entire position for a new agreement to writing, and the committee would take it back to the employees for a vote. The company had that position prepared by July 4th, forwarding it to Ms. Fraser along with a note from Mr. Sanders which read:

Dear Carol:

After three (3) meetings, I am attaching the Company's position which is available for acceptance until July 11, 1991, after which time it will be withdrawn.

Yours truly,  
R. K. Sanders

The company position itself began by stating:

Providing the Union accepts the following terms and conditions, the Company is prepared to invest in new technology and equipment at a new Packaged Gas facility located in Oakville and voluntarily recognize the Union in a separate Collective Agreement covering only the new Facility and commencing October 1, 1991.

This new Collective Agreement would have a February 28, 1993 expiry date with a 5.5% increase on March 1, 1992. Subsequent agreements to be re-negotiated separately and voted on separately from the Speers Road Agreement.

That term and 1992 increase were in accordance with the collective agreement that had already been negotiated. The document then summarized the various changes that the company was seeking in the new agreement. Under "Lay-offs" the company noted, *inter alia*:

Employees displaced from their classification under the application of the Speers Road Agreement will be offered on a seniority basis the position of Cylinder Processor at the new Oakville facility providing the new Collective Agreement for this facility is accepted.

After going through the remaining conditions offered, the document then concluded:

If the Union does not accept the conditions for voluntary recognition, preferential hiring, seniority recognition and the other improvements offered above at a new facility to be established in Oakville, the Company's offer is withdrawn and the Company will not be prepared to sign a Collective Agreement voluntarily recognizing the Union. Further the Company will locate its new facility at any place of its choosing without a Collective Agreement voluntarily recognizing the Union. We urge the Union to accept the Company's offer which provides opportunities and advantages not otherwise available.

8. The Union committee then took this document back to the membership as promised. However, the committee continued to be upset by the company's whole posture in the matter, having fully perceived the message set out by Mr. Sanders in his earlier remarks about "no jobs", and as reinforced by the closing paragraph of the company's written position. Indeed, one of the employees called by the Intervener employees (being persons employed at the new facility who oppose the Union's application/complaint here) indicated that that last paragraph left no doubt for anyone that the company was "playing hardball". Another of the employees called by the intervener simply indicated that all of the *junior* employees went to the meeting prepared to vote against the company's offer of recognition to the Union no matter what it contained, since that was clearly the only way any of them would have any chance to be the ones retained in employment at the new facility. In any event, the vote by the employees was "unanimous" to reject the proposal made by the company, and instead to pursue unfair-labour-practice proceedings before the Labour Board, as recommended by Mr. Harvey. There was a considerable amount of time spent in the evidence over just what was said at that meeting, and what was voted on, and in particular on the fact that the Union took the vote by a show of hands. On the last point, the best that the Interveners can say about the evidence is that one of their witnesses suggested that the vote against the proposal might have been "something less than 100 per cent" if the Union had opted instead for a secret-ballot vote. In the final analysis it should be recognized, however, that all of that is irrelevant for the purpose of the issues before us, and the Union is not a respondent.

9. The Union communicated the result of the meeting to the company through Ms. Fraser, and there were no more negotiations on the matter. Notwithstanding the words of warning that had been issued, the company proceeded with its plans to move to a new site *within* Oakville, in fact only a few blocks away from the Speers Road plant, at 781 Westgate Road. That was announced by the company in September, although Mr. Harvey through his own investigations had discovered the new site a couple of weeks earlier. With a minor exception, the Westgate facility was staffed entirely with personnel that had been with the company at Speers Road, although not on the basis of applying the terms of the Union's collective agreement - and not with any role being played in the matter by the Union.

10. With respect to the unfair-labour-practice allegations before the Board, and in particular the "lock-out" charge, it is obvious that the present case does not involve the typical kind of "anti-union animus" that one sees talked about in some of this and other Boards' previous jurisprudence. This is a sophisticated employer used to dealing with Unions, and whatever operational considerations led it to favour a relocation site in close proximity to its original plant within the Town of Oakville, there obviously were more "risk-free" options available to it, at least from the point of view of the potential application of the collective agreement's scope clause. In fact, its position was that it was prepared to acknowledge the Union's *bargaining rights* in any event - provided it could get the accommodations on the terms and conditions of its existing collective agree-

ment that it wanted. That too, of course, can constitute a “lock-out” or other forms of unfair labour practices, albeit in a much more difficult and subtle form. The Board finds, however, that it need not deal with that aspect of the complaint, since the only remedy the Union seeks to achieve through all but its section 15 allegation is the imposition at the new facility of the existing collective agreement. And if it turns out as a matter of law that the Union was correct from the beginning, that what the company was offering it “voluntary recognition” for was something that it already *had* under the collective agreement, that is an end to the matter.

11. When the Union was advising the company of the vote of the members against its proposal, Ms. Fraser and Mr. Harvey, who were both relatively new to the Oakville plant, learned for the first time of the existence of the Rebecca St. Hydrogen plant. They immediately grieved the non-application of the Union’s collective agreement to that plant, and the matter proceeded to an arbitration decision of Mr. O. V. Gray which was issued on November 13, 1991. Mr. Gray has some familiarity with this Board’s practices, and recognized that the scope clause in the instant certificate and collective agreement was not in *either* of the two forms that the Board traditionally sees; that is, it did not simply state “in Oakville”, without the words “at its plant”, in accordance with this Board’s normal preferred practice; but nor did it simply use the municipal street address, the way some collective agreements have not infrequently been seen to do in the more distant past. Thus Mr. Gray wrote, at page 18 of his award:

I agree with counsel for the employer that the addition of the words “at its plant” to the verbal formula ordinarily used by the OLRB must be given some significance. By the same token, though, some significance must also be given to the fact that a municipal address was not used to describe the limitation.

The “employees” referred to in a certificate or recognition clause are not just those employed at the time of certification. The employees in a bargaining unit at any particular time are all those, whenever hired, whose employment brings them within the grammatical scope of the bargaining unit description at that time. The OLRB has treated municipal limitations similarly. When a unit is defined in terms of all employees in a municipality, employees in the unit at any particular time are determined by reference to the municipal boundaries at that time, not to what the boundaries were at the time of certification: *Kohen Box Co. (Windsor) Limited*, [1966] OLRB Rep. May 117. Against the background of these tendencies to and preferences for dynamic rather than static bargaining unit definitions and interpretations, the words “at its plant” might very well not have the same effect as a limitation framed in terms of the municipal address of the plant which existed at the time of certification. Even if those words are treated as limiting by reference to what existed at the time of certification, the reference may be to function rather than location, as in the two departmental unit cases cited by the employer. On either of those views, “plant” might be treated as shorthand for “plant or plants.” The use of the latter phrase in Article 3:01 lends some support to that sort of interpretation.

Mr. Gray looked to the past practice concerning that Rebecca Street plant, however, for the guidance it provided him in deciding what was within the contemplation of the parties when they agreed to the words “at its plant in Oakville”, and concluded that that particular plant was not encompassed within the collective agreement’s scope clause. The company was arguing, of course, as it does here, that the words “at its plant” meant that the *only* plant in Oakville that could be found to fall within the contemplation of the scope clause was the one located specifically at 2393 Speers Road. In other words, the company seeks to have the collective agreement’s scope clause read to the same effect as if the street address for the original plant *had* been included. Thus Mr. Gray at the conclusion of his award observed:

... This does not take me quite as far as the employer would have me go, however. The union’s acquiescence in exclusion of the Rebecca Street employees from the scope of its collective bargaining relationship with the employer is only evidence of an understanding with respect to those employees. It is not unequivocal evidence of an understanding that the recognition clause



cannot cover employees at any location other than the Speers Road location. The parties' past practice resolves the ambiguity in the language of the recognition clause so far as is necessary for a decision about this grievance. It does not resolve it in other respects. The remaining ambiguity will have to be resolved in other proceedings, as the need arises, if the parties are not able to agree in the meantime on more precise language.

12. By those comments Mr. Gray appears to us to have been fairly anticipating a case like the present. That there are substantial differences in the two situations is apparent - indeed, it is clearly reflected in the testimony of the company witnesses themselves. Mr. Johnston, for example, in outlining the various operations of the Division, himself drew a distinction between facilities like those of the air separation and packaged-gas filling plants at Speers Road, and Hydrogen plants. More to the point, Mr. Sanders in cross-examination was asked to explain why the company was prepared to offer "voluntary recognition" to the Union for the new facility at Westgate, when it had never thought to do so for Rebecca Street. Mr. Sanders' answer is contained in the following exchange:

Mr. U: With respect to your voluntary recognition offer, do you see any differences?

Mr. S: Yes. The difference was the hydrogen *per se*. We went into it for the first time. It was the first time that we had gone into cleaning up someone else's hydrogen stream. Previously we had bought it from our competitors.

Mr. U: And sold it to others?

Mr. S: Yes.

Mr. U: And that's why it's different?

Mr. S: Yes.

Mr. U: What's that got to do with Union recognition?

Mr. S: The Packaged Gases Operation that we were moving *out* - the work being done is the same; it's the same product lines being done in a different way.

Mr. U: So there *is* a difference between the 1982 situation and the 1991 situation in your mind.

Mr. S: Yes.

Or as Mr. Johnston put it, "in the case of the Hydrogen plant there were no job losses because the work was not *done* at the Speers Road plant". While Mr. Johnston at that point was doing his best to explain the distinction in purely equitable terms, we find that distinction articulated by both him and Mr. Sanders to be most material on the legal question as well. That is, we find that the phrase "at its plant in Oakville" makes the most sense when read to describe the "function", in the words of Mr. Gray, of the plant that was located at the time at 2393 Speers Road, rather than the street address itself. To test that proposition, it seems to us, one could ask the question whether the parties would have contemplated that, following the granting of the Board's certificate on this agreed-upon description, the Union's bargaining rights would have ceased to have application in the event the company chose simply to move its plant to a new municipal address across the street. And the same conclusion appears to us to arise where the move, as here, was of only one of the segments of the Oakville plant's business, and where it was a few blocks away, rather than across the street. One has no way of knowing how much "bluff" there may have been in the position adopted by the company in offering "voluntary" recognition for this new site, in the hope of achieving the kind of concessions the company felt were critical to making the new operation a success. Certainly the company had not a great deal to lose, given the lack of greater specificity in the scope clause and

the history of the Hydrogen plant, to take the position it did, and see whether there was enough uncertainty on the Union's part to allow the company to achieve its collective-bargaining goals. In the end, however, we find that the Union's assessment of the situation was correct, and that the company was seeking to bargain with them on the basis of offering to the Union what was already theirs.

13. We accordingly find and declare that the Union's existing collective agreement with the company covering "all employees at its plant in Oakville" encompasses as well as the Speers Road facility the new location for the Packaged Gases plant opened by the company on Westgate Road. It follows from that that the staffing and subsequent operation of that new plant was governed by and should have been carried out in accordance with that collective agreement, and the parties are directed to meet forthwith and attempt to work out an agreement as to how the current situation is to be rectified. As noted at the outset, the Board has made this determination as to the coverage of the collective agreement's scope clause, rather than defer to arbitration as suggested by the respondent, as a necessary first step in addressing the various charges and issues that were potentially included in the case brought before us. However, should any dispute continue to exist between the parties with respect to what ought to have been done to properly apply the collective agreement, or what remedies ought to flow as a result of that failure, that is a matter which at this stage can and should be determined for the parties through private arbitration under the collective agreement itself, rather than through this public tribunal. The Board accordingly directs the parties to waive the time limits for resurrecting the initial grievances dealing with this matter, and to use them as a vehicle, under the applicable procedures of the collective agreement, to address the question of remedies flowing out of the Board's finding here that the collective agreement applied to the new plant opened by the respondent at 781 Westgate Road in Oakville.

14. Again as noted, the finding above on the Scope clause takes care of the bulk of the unfair labour practice charges that have been placed before us here, each with a view to having the Board arrive at and direct the same result that the Board has just arrived at through its interpretation of the collective agreement. The only exception is with respect to the allegation of a breach during the negotiations of the duty to bargain in good faith, and for which the Union reserved the right to address the Board on remedy, depending on the actual findings of the Board in that regard, and also the findings made by the Board on the other aspects of the case. The Board recognizes that there may not in fact be a great deal which the Union will be concerned about seeking, in light of the situation as it stands and the order of the Board on the main aspect of the complaint, but in light of the Union's position it remains necessary for the Board to set out the pertinent facts and its findings in connection with the bargaining complaint.

15. In assessing that complaint, it is necessary to look at the situation as it in fact existed, as disclosed by the evidence that came out before the Board in the course of this lengthy proceeding, and not as the Union, or its representative Carol Fraser, knew it at the time the company decided to disclose it, on June 13th. The critical evidence in all of that is that of Mr. Johnston, particularly in light of the company's evidence as to how little the company's negotiator at the table, Mr. Sanders, actually knew, and when.

16. Mr. Johnston has been with the company for 18 years, and at the time of these events was General Operations Manager for Linde, Canada'-wide. He at all times reported to an appointee out of Danbury, but, owing to the wide-scale shuffling of senior personnel and corporate parts which Mr. Johnston outlined in great detail for this period, there were times between the summer of 1990 and 1991 when Mr. Johnston was the most senior person in the Division who was actually headquartered in Toronto. Mr. Johnston spoke also of the financial pressures affecting the company on a general scale, leading, in fact, to the sale of the company's long-held Head Office Build-



ing in downtown Toronto, and a substantial down-sizing of the staff there. Oakville was the largest of the company's Packaged Gas facilities in Canada, and the Canadian operation had been performing moderately well in recent years. However, the Packaged Gas business generally had been coming under intense pressure from low-cost producers, to which Canada was being increasingly exposed through the effect of the Free Trade agreement. Mr. Johnston testified that in September of 1990 the company had broken up its Packaged Gas business in the United States and sold it off to employees locally. World-wide, however, Packaged Gases were still the major component in the company's Industrial Gas business, and outside of North America, quite profitable. Mr. Johnston in fact raised the subject of divestment with his Danbury superiors at the time of the U.S. action, and was told that no similar plans existed for Canada. Mr. Johnston was told, however, that the parent company would henceforward be looking for a return on capital of 13%, or 20% on operating profit, in order to match what some of its competitors were achieving.

17. Through the course of 1990 Mr. Johnston had been monitoring the testing of new, computer-based handling and filling equipment at two of the company's Quebec plants, Varennes and Bourgeois Street in Montreal, and the results were extremely positive. By the end of 1990 Mr. Johnston therefore made what he describes as a "personal" decision that these new methods should be introduced at the Oakville plant, to improve its productivity, as well. To that end he convened a meeting for December 3rd and 4th at Head Office of a number of management individuals in the company, including a number from Oakville. Mr. Johnston explained to the group what the experience with the new technology had been in Quebec, and indicated that he would give them time over the next two days to come up with specific recommendations as to how it could be implemented in Oakville, looking in particular at the the lay-out of the Speers Road plant. That was about as far as the matter proceeded at that point. Later in December, however, Mr. Johnston had a conversation with Leo Duval, one of the senior technical people working on the project that Mr. Johnston had assigned, and Mr. Duval outlined for Mr. Johnston a number of physical problems involved in trying to make the new technology fit the Speers Road lay-out. In particular, Mr. Duval noted that it would be virtually impossible to carry out new construction at the site without at least temporarily relocating the garage facility to another location of the company in the proximate area. Mr. Johnston responded that, in light of the problems raised, Mr. Duval should as well have a search begun to locate alternative sites, within the general confines of the Oakville, Milton, Hamilton area. That was done immediately, and by January 30th the company had compiled a listing of 11 available and potentially acceptable properties. These were all scored according to 17 different attributes, and whatever system was used, 781 Westgate, the eventual "winner", was ranked first by a considerable margin at 122, with the next 4 closest properties being ranked at 97, 96, 96, and 96 respectively.

18. There had to this point been no one from Human Resources spoken to about these ongoing activities because, Mr. Johnston testified, the project had not yet reached that stage. Mr. Johnston indicated that he had not yet made a decision which of the options to recommend to Danbury, and that in fact, with the tumult and lack of consistent direction in the company, he had no idea whether there was any inclination to spend any further money on the operation at all. With negotiations for that plant coming up on February 20th, however, Mr. Sanders, as an experienced negotiator, followed his usual practice and went to see the individual in charge, Mr. Johnston, to ask if there were any plans in the offing that might affect the negotiations with the Union. Mr. Johnston's reply was that "everything was being studied", that there were many options under consideration, and that if any decisions were made, Mr. Sanders would be advised. Mr. Sanders testified that that was typical of the Oakville situation, and that he had learned long ago that there was no sense fanning the rumour flames with discussion of things that might or might not come to pass. Similar evidence in fact came from one of the senior employees called by the Interveners, stating that there were always different things being looked at for Oakville, with, in some cases, even lay-



outs being drawn up and discussed with the employees, but that these had rarely come to anything. Mr. Johnston's own explanation in cross-examination for not sharing with Mr. Sanders the state of his thinking and the actions arising out of the December meeting was that Mr. Sanders "didn't need to know". Asked whether Mr. Sanders did not need to be fully apprised of the facts so that he would be in a position to fashion an honest response if a *question* were asked at the bargaining table, Mr. Johnston replied that "Mr. Sanders would have been apprised of any factual information necessary - when decisions had been made that had been brought up in the course of the negotiations". Mr. Johnston added that he also did not think it appropriate to single out for mention the new technology project for the Packaged Gas operation, because that was only one of many options being considered for Oakville as a whole, and many of the others were much less farther along. When pressed Mr. Johnston conceded that none of those other "options" had any bearing on what was going to happen with the Packaged Gas initiative, but stated that it was the sheer *number* of the other options that made it inappropriate to comment specifically on the Packaged Gas initiative. When Mr. Sanders did come to attend the opening bargaining meeting on February 20th, therefore, the answer he gave was, according to his testimony, essentially the answer that Mr. Johnston had given *him*, that there were "always" studies ongoing for the Oakville plant, that there were many options being studied, and that when and if decisions were made, the company would let the Union know. Mr. Sanders testified that he did not go back to Mr. Johnston to check the matter any further after the Union had raised the specific rumour of the personnel in the garage facility being moved because Mr. Johnston had already told him that he would get back to him when and if any decisions were made, and he had no reason not to accept that.

19. As for the move of the Packaged Gas facility itself, Mr. Johnston in cross-examination indicated that the focus did not come off the expansion of Speers Road rather than moving the Packaged Gases to a new location until some time in early May, when the company got some response back on the availability and cost of leased facilities. Until that point in May, Mr. Johnston insisted, the company was still considering the expansion of Speers Road as an option - notwithstanding the lack of evidence of any working documents or drawings beyond the preliminary lay-out drawing done by Mr. Duval's group in December. In direct examination Mr. Johnston did acknowledge that he had seen the report on Westgate Road from the outside realtors when it came in in mid-April. That report appears to be simply confirmatory of an earlier report of March 13th, and indicates in greater detail the reasons for considering 781 Westgate Road as the frontrunner. Perhaps more informative for our purposes, however, is the Property Budget Request prepared internally by the company and bearing date April 10, 1991, which outlined the thinking of members of the management team with respect to the project in considerable detail. Beginning with the "Purpose" the document notes:

Purpose

The purpose of the lease proposal is to provide a new packaged gas cylinder filling plant which will incorporate new filling and handling technologies.

Consistent with Linde's strategy of being a low cost producer in the industrial cylinder gases business, over the last year the Packaged Gases operations group have been reviewing the latest advancements in cylinder filling technology and theory.

An extensive test is being carried out at the Montreal Bourgeois St. facility to model the chosen blend of technology and handling theory. Based on the results to date, significant savings are available resulting from both technological advancements as well as increasing management effectiveness.

The key advancements hinge around two points:

- 1) The standardizing of the filling procedure through automating the filling process of both pure gases and mixtures.
- 2) The control and coordination of the cylinder handling methods/approach through the use of fork-lifts and 16 cylinder carrying buckets.

Consistent with this strategy, the analysis of the productivity of the various plants were reviewed against productivity measures.

The plant with the lowest relative productivity was the Oakville location (Linde's largest cylinder filling location). The primary reasons for this are layout, culture and product mix.

The results of implementing this technology are expected to be in an increase of 30% as compared to the current plant efficiency (pertaining to the Packaged Gases side only). In real terms, this represents a total decrease in fifteen positions out of a total of thirty-five hourly and four clerical.

The implementation of this strategy will require a significantly different plant and equipment layout.

The document then sets out the "Alternatives considered", beginning with the expansion of Speers Road:

#### Alternatives Considered

1. Remain at present location.

This option was considered extensively and basically there were three drawbacks:

- i) The current land available at the plant is on top of an old lime pond. As well, the City of Oakville has a beautification plan on Speers Road, which will affect us in how and where Linde can build. Both factors cause the construction costs of building the proposed facility to exceed 3 million dollars.
- ii) Secondly, the new technology and approach will require significantly different work rules than those currently under contract at the 2393 Speers Rd. site. The operations group does not believe that the productivity gains will be available by remaining on the same site.
- iii) Thirdly, there will be a major disruption of the current operations during construction due to the location of the most desirable building site.

The alternative is not recommended.

The other two alternatives are then set out, being to build a new facility off-site, or to lease an existing one. On the basis of up-front costs and the company's cash position, the document recommends the latter. And as for available properties, the document notes:

The proposed facility on Westgate Road is the only property available at the present time that consists of 4.1 acres of land. This facility is ideal and its location is considered to be a safe distance from major highways and residential areas.

It is recommended that we proceed with this alternative.

The document then concludes with:

Financial Considerations

The key financial return on the property is the increase in plant productivity and the resultant labour savings. These labour savings are expected to be in the order of \$550,000 per year. A complete economic analysis showing the changes in income streams, including capital investments covered in a separate PBR are included in Appendix B.

The pertinent costs involved an outlay of some \$950,000 for the purchase and installation of the new equipment (which would have to be borne no matter which of the options were selected), and for the Westgate lease option just over \$3 million dollars in a 10-year gross lease commitment. The latter was less than the cost of new construction at either the existing or a new location, and of course is amortized over a ten-year period (including the cost of the leasehold improvements). At this point in time the approval that Mr. Johnston required before proceeding to make an Offer to Lease to the owners of 781 Westgate was that of the International Vice-President in Danbury, John Dobbins, and on May 7th the Property Budget Request was faxed to him, along with a couple of other costing pages. As that was being done, Mr. Johnston telephoned Mr. Dobbins directly, and outlined for him in more detail the thinking behind the request. Mr. Johnston called Mr. Dobbins the next day to ask if he had any more questions after having seen the PBR, and Mr. Dobbins advised that he had already approved it. Mr. Dobbins then went on to ask about Mr. Johnston's plans for communicating the decision to the employees without delay.

20. From there took place the meeting in the middle of May with Mr. Sanders and legal counsel discussed above, and a timetable for meeting with the Union and employees was worked out. In the meantime, work proceeded on negotiating and finalizing lease arrangements with the landlord of 781 Westgate. The Offer to Lease was submitted to the landlord immediately following the approval given by Mr. Dobbins, and was accepted, subject to suitable language for the terms and conditions of the lease being worked out. The original deadline agreed to for doing that was May 31st, but as negotiations bogged down over certain items, it was extended a couple of times, before the company insisted that the negotiations be brought to a close not later than June 30th. In fact, the terms of the lease did finally get resolved on June 14th, with the lease document itself agreed to be signed on June 30th.

21. It will be recalled that it was on June 14th that the company first sat down with the various groups of employees to make its announcement about the move. At that point, it will also be recalled, the company advised the Union and the employee groups that the new location for the Packaged Gas operation would "in all probability" be in Oakville. Mr. Johnston testified that a week or so prior to that date he contacted his real estate people and inquired as to the status of the lease negotiations. He said that he was advised that they were still ongoing, and that he never did check back again closer to the announcement and meeting date. He testified that at lunch prior to those meetings with the employees on the 14th his managers raised the question of the status of the lease negotiations, and that he advised them that there was still no resolution. He then attended the employee meetings, and left on four weeks' vacation that night. He did, however, remain in touch with Mr. Sanders on the progress of the negotiations with the Union over the new collective agreement, and had read to him the Proposal document that was to be issued to the Union on July 4th to take back to the membership. Notwithstanding the fact that, as it turns out, the lease negotiations had been successfully concluded and the lease in fact signed, the last paragraph of that document, once again, read:

If the Union does not accept the conditions for voluntary recognition, preferential hiring, seniority recognition and the other improvements offered above at a new facility to be established in Oakville, the Company's offer is withdrawn and the Company will not be prepared to sign a Collective Agreement voluntarily recognizing the Union. *Further the Company will locate its new facility at any place of its choosing without a Collective Agreement voluntarily recognizing*



*the Union.* We urge the Union to accept the Company's offer which provides opportunities and advantages not otherwise available.

(emphasis added)

Mr. Johnston testified that he was unaware when he approved that language that the lease for Westgate had actually reached the point that it did, and that because he was away on vacation with his family, he did not make any attempt to contact the real estate department to find out otherwise. He added that at that point in time it was "only the negotiations with the Union" that were on his mind.

22. That latter statement seems to be closer to the truth than Mr. Johnston may have intended. It clearly would have been no more difficult for Mr. Johnston to be in touch with the real estate department than with Mr. Sanders, or to have Mr. Sanders himself do that, had Mr. Johnston considered it beneficial to do so. But obviously, the company was in a better position vis-a-vis placing pressure on the employees to be able to imply in its proposal document that it had not yet committed itself to a location, and Mr. Johnston showed little interest in anyone, including himself, being disabused of that fact. The dealings with the Union at this point in time are not, of course, directly relevant on the "bargaining" issue, having taken place well after the renewal collective agreement between the parties had been consummated. Nonetheless, this portion of the evidence is informative, as indicative of a company approach of keeping the management side effectively "in the dark" when it suited its purposes in dealing with the Union, and as a result, affording greater latitude in making statements to the Union that might otherwise have been more difficult to make. This, on balance, we find to have been the case during the critical time period of the February and March negotiations as well.

23. As the Board has frequently noted, the critical aspect about collective bargaining in a jurisdiction similar to our own is that, barring specific statutory exceptions, the Union's right to seek to engage in bilateral decision-making is confined to the "open period" between collective agreements, and before a deal has been struck which takes the parties into the time-frame of a new collective agreement. As the Board commented, for example, in the *Westinghouse Canada* case, [1980] OLRB Rep. April 577, at paragraph 39:

39. Collective bargaining during the prescribed "open period" is the preferred vehicle for establishing terms and conditions of employment in this jurisdiction. With the exception of union recognition and inter-union jurisdictional disputes the scope of matters which may be bargained to impasse in this jurisdiction, as contrasted to bargaining under the *National Labour Relations Act*, is virtually unlimited as is seen from the statutory definition of collective agreement. A collective agreement is defined in the Act as an agreement in writing containing provisions respecting terms and conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees and under section 14 of the Act the parties are required to bargain in good faith and make every reasonable effort to make a collective agreement. Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its term regardless of changing economic conditions or management initiatives. The restrictions placed upon a trade union in this regard are to be contrasted with the freedom allowed under section 152 of the *Canada Labour Code*, c. L-1 which permits a trade union to bargain to impasse about the effects of technological change occurring during the term of a collective agreement.

Thus, reasoned the Board:

... can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circum-

stances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

In using the term “decisions”, however, the Board at the same time was mindful of the obvious extent to which such a “bright-line” test could invite manipulation by the employer. The timing of such decisions, therefore, or the employer’s announcement of same, continue to be a matter of concern to the Board when following in close proximity to the consummation of what the employer professes to be a good-faith collective bargaining agreement with the Union. And that is why the Board in *Westinghouse* made it clear that in appearing to adopt actual “decisions” made by the corporation as the test for unsolicited disclosure, it had in mind when saying that what it described as “*de facto*” decisions as well (see paragraph 41). As the Board put it in *Consolidated Bathurst Packaging Limited*, [1983] OLRB Rep. Sept. 1411, at paragraph 50:

... plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced “on the heels” of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between “proposals” and “decisions” at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation.

24. All of the Board’s comments cited above deal with the issue of “voluntary” or “unsolicited” disclosure. The Board has been quite deliberate, however, in distinguishing the situation where the company has to decide whether it is appropriate to raise something on its own, from that where the Union has shown sufficient interest in the topic to specifically *make* the inquiry at the bargaining table. In the latter case the Board in *Westinghouse*, also at page 39, wrote:

Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit.

Indeed, in the very course of concluding that the line should be drawn at “decisions” (however loosely defined) in the situation where there has been no inquiry put forward on the part of the Union, the Board went on as follows to comment upon the kind of “balancing” that it found necessary in arriving at that conclusion:

40. The more difficult question is whether there is an obligation on an employer to reveal on his own initiative plans which are not finalized at the time of bargaining but which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees. On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.

41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one



reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. *Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit*, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on its own initiative plans which have not become at least de facto decisions.

(emphasis added)

It has always been the view of the Board, as Mr. Ublansky put it in other words, that the specific asking of the question by the Union "sharpens" the obligation to disclose (see, once again, *Consolidated Bathurst*, *supra*, at paragraph 43). And as a necessary addendum to that, the Board has also noted that it is part and parcel of the duty to bargain in good faith for the employer to ensure that it is sending "informed" representatives to the table as its negotiators. As the *Consolidated Bathurst* case itself stated, at paragraph 53:

... Further, it is no answer that the company's negotiators knew nothing about the impending closing. The company has a statutory responsibility to send informed representatives to the bargaining table.

More recently, see for example *Plaza Fiberglass Manufacturing Limited*, [1990] OLRB Rep. Feb. 192 at paragraphs 27 and 28.

25. The Board has a number of problems with the posture adopted by Mr. Johnston in the present case. In the first place, while the ultimate parameters of the company's action were yet to be determined, there *was* a decision made in December, by Mr. Johnston at least, to implement technological change within the Oakville Packaged Gas operation. Those changes were fundamental and sweeping, and it is apparent from the subsequent documentation that the productivity "savings" being aimed for were expected to come from a substantial reduction in the size of the labour force. Mr. Johnston argued in cross-examination that that was *not* the lesson that could be drawn from the Varennes experience, for example, but all that his evidence demonstrates is that the reduction in staffing that would have been produced there was offset by the introduction of new products to the facility. There was no suggestion of any similar kind of offset on staffing levels ever being contemplated as part of the plan for Oakville (as the company's own internal documents make clear). Mr. Johnston's main argument for not disclosing, however, is the total uncertainty of whether *anything* that he might ultimately recommend to Danbury would be accepted as consistent with the direction in which Danbury was prepared to move with respect to that particular business. But the absence of a manager from Danbury on a permanent basis in Toronto did not prevent Mr. Johnston's superior from commuting, as Mr. Johnston testified, to Toronto from time to time; nor, obviously, would it prevent Mr. Johnston from maintaining contact with Danbury by way of trips of his own, or by telephone. Mr. Johnston impressed the Board as an extremely competent and efficient manager, and it is simply not credible that he would have proceeded to devote as much of



his time, as well as that of a host of management individuals below him, without having obtained some kind of a “read” of the direction of current Danbury management with respect to the Packaged Gas operation in Canada. In fact, Mr. Johnston acknowledges that he asked that very question in the fall of 1990, when the decision was made to divest the company of its Packaged Gas Division in the United States. That there *was* support for maintaining and enhancing the presence of that Division in the Canadian market is further demonstrated by the initiatives and investments that were carried out in that same year in Varennes and Montreal. Nor is the amount of the investment being contemplated here of particularly significant proportions, when viewed in the context of a huge multi-national operation like that of Union Carbide. Indeed, all of the uncertainty and lack of focus at Danbury about which Mr. Johnston testified at such great length seems oddly out of place with what it is that actually happened when the “Lease Proposal” ultimately was submitted to Danbury: Mr. Dobbins approved it within 24 hours. Mr. Johnston’s explanation for that is that he “must have done a really good selling job” in the telephone conversation the previous day.

26. Nor do we find compelling Mr. Johnston’s assertions that the focusing of the company’s action on finding a new location rather than expanding Speers Road did not take place until well after the close of Union negotiations in March. The problems with the Speers Road plant, and with carrying out construction at Speers Road, were all known and identified in December, and there is no evidence of any activity continuing in that direction at all beyond that date. But we do not have to decide the issue as to whether the company’s plans to relocate the Packaged Gas operation had become sufficiently ripe during negotiations for the company to have volunteered them to the Union at the bargaining table. Because the Union *did* ask the question. In terms of the Board’s test in that kind of situation, we are prepared to accept Mr. Sanders’ evidence that he *did* answer honestly. From what had been disclosed to Mr. Sanders himself, there was absolutely nothing out of the ordinary going on with respect to the overall operation at Oakville, outside of the “usual” kind of studies that he, and others, testified were constantly being carried out, and his answer clearly conveyed that. The fact that he confirmed that studies were going on at *all*, and that a variety of options were being considered, was not likely to allay any concerns that the Union might have completely, and it did not. The Union maintained their position on new “Closure” language until late in the bargaining, but in the end made the decision to drop it in the face of the information that they had, and in the interest of moving the negotiations toward a final settlement. However, the information that had been imparted to them by Mr. Sanders was incomplete and, we find, misleading, simply because the information that had been imparted to Mr. Sanders himself was of that quality. More specifically, the plans with respect to addressing the productivity problems of the Packaged Gas operation at Oakville by way of new technology, staff reduction, and a potential move of the operation were *not*, at the stage of the negotiations, simply on a par with the other “studies” that were going on around the plant, or that had been carried out on an exploratory basis in the past. Mr. Sanders should have been made aware of those facts, so that he would be in a position to fashion a response to the Union which, if and when it asked about things such as “any plans to relocate”, could fairly and properly reflect that.

27. It is therefore the conclusion of the Board that the company has been in breach of its duty to bargain in good faith as well in this matter, and we will afford the Union the opportunity as requested to consider its position with respect to remedy, and to address that matter further to the Board should that be necessary.

#### **DECISION OF BOARD MEMBER G. O. SHAMANSKI; May 29, 1992**

1. With all due respect to my colleagues, I do not concur with the decision of the majority of the Board. I would not have found that the current collective labour agreement between the Energy & Chemical Workers Union Local 593 and Union Carbide Canada Ltd. extended the bar-

gaining rights of this unit beyond the Speers Road's facility, and accordingly I would have dismissed this application.

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## COURT PROCEEDINGS

**2708-90-R (Court File No. 157/92) Polytech Coatings Limited, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and Ontario Labour Relations Board, Respondents**

**Charges - Evidence - Intimidation and Coercion - Judicial Review - Representation Vote - Stay - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent**

Board Decision reported at [1992] OLRB Rep. March 362.

*Ontario Court of Justice, Divisional Court, Steele J., May 11, 1992.*

**STEELE J. (Endorsement):** On consent of the parties the motion is dismissed with costs to be determined by the panel hearing the application and on the following terms:

1. The applicant is to perfect its application on or before May 20/92.
  2. The application is fixed to be heard on June 4/92.
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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1992

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**2920-90-R:** Amalgamated Clothing and Textile Workers Union (Applicant) v. Georgian Industries Inc. (Respondent)

Unit: "all employees of Georgian Industries Inc. at its Bayweb Division the Village of Elmvale, save and except Supervisors, persons above the rank of Supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (89 employees in unit) (*Having regard to the agreement of the parties*)

**0466-91-R:** United Food And Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Applicant) v. The Homewood Sanitarium of Guelph Ontario Limited c.o.b. as Homewood Health Centre (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of The Homewood Sanitarium of Guelph Ontario Limited c.o.b. as Homewood Health Centre in the City of Guelph, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, paramedical employees, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (68 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of The Homewood Sanitarium of Guelph Ontario Limited c.o.b. as Homewood Health Centre in the City of Guelph regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, paramedical employees, and office and clerical employees" (68 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0958-91-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Bayritz Masonry Ltd. (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener)

Unit: "all construction labourers, in the employ of Bayritz Masonry Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit) (*Having regard to the agreement of the parties*)

**2446-91-R:** United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Arosan Enterprises Ltd. (Respondent)

Unit: "All carpenters and carpenters' apprentices in the employ of Arosan Enterprises Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and, all carpenters and carpenters' apprentices in the employ of Arosan Enterprises Limited in all sectors of the construction industry in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)



**3139-91-R:** Practical Nurses Federation of Ontario (Applicant) v. South Muskoka Memorial Hospital (Respondent)

Unit: "All employees of the respondent in the Town of Bracebridge employed as registered or graduate nursing assistants, save and except nurse manager and persons above the rank of nurse manager" (43 employees in unit)

**3236-91-R:** United Steelworkers of America (Applicant) v. ESM Metallurgical Products, Inc. (Respondent)

Unit: "all employees of ESM Metallurgical Products, Inc. in the City of Nanticoke, save and except supervisors and persons above the rank of supervisor, sales staff and the service technician" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3264-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Township of Kaladar, Anglesea and Effingham (Respondent)

Unit: "All employees of the Corporation of the Township of Kaladar, Anglesea and Effingham, save and except Deputy Clerk and persons above the rank of Deputy Clerk, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit)

**3429-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Delfino Masonry Ltd. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Delfino Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Delfino Masonry Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

**3541-91-R:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Plan Mechanical Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice sheet metal workers in the employ of Plan Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of Plan Mechanical Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

**3577-91-R:** United Steelworkers of America (Applicant) v. Gerard Derouin Limited c.o.b. Chelmsford Metro (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Gerard Derouin Limited c.o.b. Chelmsford Metro in the Town of Rayside-Balfour, save and except head cashiers, department managers and persons above the rank of head cashier or department manager" (57 employees in unit) (*Having regard to the agreement of the parties*)

**3585-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Inc. (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Classic Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons'

apprentices in the employ of Classic Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (34 employees in unit)

**3720-91-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pacific Hardwood Ltd. c.o.b. Reliable Lumber Products (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Pacific Hardwood Ltd. c.o.b. Reliable Lumber Products in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Pacific Hardwood Ltd. c.o.b. Reliable Lumber Products in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**3878-91-R:** Ontario Liquor Board Employees’ Union (Applicant) v. DFS Canada Ltd. (Respondent)

Unit: “all office and clerical employees of DFS Canada Ltd., in the City of Mississauga, save and except Assistant Supervisors, persons above the rank of assistant supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (2 employees in unit) (*Having regard to the agreement of the parties*)

**4000-91-R:** Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. Classic Masonry Inc. (Respondent)

Unit: “all construction labourers in the employ of Classic Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Classic Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (23 employees in unit)

**4001-91-R:** Energy & Chemical Workers Union (Applicant) v. Dynacast Canada Inc. (Respondent)

Unit: “all employees of Dynacast Canada Inc. in its Brockville Division in the City of Brockville, save and except forepersons and those above the rank of foreperson, office and sales staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

**4080-91-R:** Retail, Wholesale & Department Store Union (Applicant) v. City Bakery (Northern) Limited (Respondent)

Unit: “all employees of City Bakery (Northern) Limited in the City of North Bay, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Foremen, persons above the rank of Foreman, office, transport and sales staff (including Thrift Store employees)” (10 employees in unit) (*Having regard to the agreement of the parties*)

**4088-91-R:** Canadian Union of Public Employees (Applicant) v. Kingston Daycare Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Kingston Daycare Inc. in the City of Kingston, save and except Supervisors, persons above the rank of Supervisor and Secretary to the Director” (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**4094-91-R:** Independent Canadian Extrusion Workers’ Union (Applicant) v. Advanced Monobloc, Division of CCL Industries Inc. (Respondent)

Unit: “all employees of CCL Industries Inc. at its Advanced Monobloc Division in the Town of Penetanguishene, save and except Foremen, persons above the rank of Foreman, office and sales staff, persons regularly



employed for not more than 24 hours per week and students employed during the school vacation period” (152 employees in unit) (*Having regard to the agreement of the parties*)

**4111-91-R:** United Steelworkers of America (Applicant) v. Dan Courville Chevrolet Geo Oldsmobile Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Dan Courville Chevrolet Geo Oldsmobile Ltd. in the City of Sudbury, save and except Supervisors, persons above the rank of Supervisor and vehicle sales clerk” (40 employees in unit) (*Having regard to the agreement of the parties*)

**4116-91-R:** United Electrical, Radio and Machine Workers of Canada (UE) (Applicant) v. Labour Council of Metropolitan Toronto and York Region (Respondent)

Unit: “all Executive Assistants employed by the Labour Council of Metropolitan Toronto and York Region in the Municipality of Metropolitan Toronto and the Regional Municipality of York, save and except the President and persons above the rank of President” (2 employees in unit) (*Having regard to the agreement of the parties*)

**4117-91-R:** International Union, United Plant Guard Workers of America Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all security guards in the employ of Burns International Security Services Limited in the County of Middlesex, Huron and Oxford, save and except Guard Inspectors, persons above the rank of Guard Inspector, office clerical and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period” (178 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**4136-91-R:** Practical Nurses Federation of Ont. (Applicant) v. Select Living (1991) Ltd. (Respondent)

Unit: “all employees of Select Living (1991) Ltd. at The Barclay House in the City of North Bay employed as Registered or Graduate Nursing Assistants, save and except Managers and persons above the rank of Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

**4143-91-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. Kermecho Co. Limited and Ajax Energy Corporation (Respondents)

Unit: “all wood fuel handling employees and heavy equipment operators of Kermecho Co. Limited and Ajax Energy Corporation at its steam plant, 170 Mills Road, Ajax, save and except Supervisors, Chief Engineers, persons above the rank of Supervisor, Chief Engineer and persons in bargaining units for whom any trade union held bargaining rights as of March 25, 1992” (5 employees in unit) (*Having regard to the agreement of the parties*)

**4149-91-R:** International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Benogran Electric Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Benogran Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Benogran Electric Ltd. in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

**4166-91-R:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. Theatrecorp Ltd., WGC Facility Management Corporation and Theatremark Ltd. (Respondent)

Unit: “all carpenters, electricians, sound and property persons employed by Theatrecorp Ltd. WGC Facility Management Corporation and Theatremark Ltd. as stage employees at the Elgin and Wintergarden Theatres



at 189 Yonge Street in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (16 employees in unit) (*Having regard to the agreement of the parties*) (Clarity Note)

**4178-91-R:** Canadian Security Union (Applicant) v. The Hudson’s Bay Company (Respondent)

Unit: “all Security Guards in the employ of The Hudson’s Bay Company, at its Bay store at 3030 Howard Avenue, in the City of Windsor, save and except Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university” (2 employees in unit) (*Having regard to the agreement of the parties*)

**0011-92-R:** United Food & Commercial Workers, Local 206 chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L.-C.I.O. (Applicant) v. J. Xavier Ent. Inc. c.o.b. as Swiss Chalet Restaurant (Respondent)

Unit: “all employees of J. Xavier Ent. Inc. c.o.b. as Swiss Chalet Restaurant at 6430 Erin Mill Parkway in Mississauga, employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and assistant dining room manager trainees, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager” (49 employees in unit) (*Having regard to the agreement of the parties*)

**0013-92-R:** Service Employees Union Local 268 Affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Corporation of the Town of Marathon (Respondent)

Unit: “all employees in the Recreation Department of The Corporation of the Town of Marathon, save and except Supervisors, persons above the rank of Supervisor, office and clerical employees, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and employees in bargaining units for whom any trade union held bargaining rights as of March 31, 1992” (12 employees in unit) (*Having regard to the agreement of the parties*)

**0028-92-R:** Office and Professional Employees International Union (Applicant) v. Smooth Rock Falls Hospital Corporation (Respondent)

Unit: “all employees of Smooth Rock Falls Hospital Corporation in its Detoxification Centre, save and except Supervisors, persons above the rank of Supervisor and persons for whom any trade union held bargaining rights as of April 1, 1992” (12 employees in unit) (*Having regard to the agreement of the parties*)

**0034-92-R:** United Food and Commercial Workers International Union A.F.L./C.I.O. C.L.C. (Applicant) v. United Employees Credit Union Limited (Respondent)

Unit: “all employees of United Employees Credit Union Limited in the Province of Ontario, save and except Branch Managers and persons above the rank of Branch Manager” (21 employees in unit) (*Having regard to the agreement of the parties*)

**0041-92-R:** Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses - York Branch (Respondent)

Unit: “all Registered and Graduate Nursing Assistants employed in a nursing capacity by the Victorian Order of Nurses - York Branch, in the Regional Municipality of York, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

**0063-92-R:** Ontario Public Service Employees Union (Applicant) v. St. John’s Training School For Boys (Respondent)

Unit: “all office and clerical employees of St. John’s Training School For Boys in the Township of Uxbridge, save and except Supervisors, persons above the rank of Supervisor, Plan of Care Coordinator, Accounting Clerk and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

**0087-92-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, Peel Branch (Respondent)**

Unit: "all registered and graduate nursing assistants employed in a nursing capacity by the Victorian Order of Nurses, Peel Branch, in the City of Mississauga, save and except Supervisors, person above the rank of Supervisor, office and clerical staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

**0144-92-R: Ontario Public Service Employees Union (Applicant) v. Huntington University (Respondent)**

Unit: "all office, clerical and technical employees of Huntington University in the City of Sudbury, save and except Supervisors, persons above the rank of Supervisor, Accounting Assistant, Executive Assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote****3817-91-R: IWA - Canada (Applicant) v. Kimberly-Clark Canada Inc. (Respondent) v. Canadian Paperworkers Union and its Local 307 (Intervener)**

Unit: "All employees of Kimberly-Clark Canada Inc. in Metropolitan Toronto, save and except supervisors, temporary supervisors and office staff" (250 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	239
Number of persons who cast ballots	201
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	185
Number of ballots marked in favour of intervener	15

**3856-91-R: IWA - Canada (Applicant) v. Kimberly-Clark Canada Inc. (Respondent) v. Canadian Paperworkers Union and its Local 289 (Intervener)**

Unit: "all hourly-rated employees of Kimberly-Clark Canada Inc. on all matters pertaining to rates of pay, hours of work, or other working conditions, provided that all employees while within the following classifications shall not be subject to the provisions of the agreement: Superintendents and Assistant Superintendents, Foremen, Office Staff, Stores Department, Engineering Department, Watchmen. These employees are considered as part of the management of the Company under this Agreement" (149 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	147
Number of persons who cast ballots	122
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	122
Number of ballots marked in favour of applicant	105
Number of ballots marked in favour of intervener	17

**Bargaining Agents Certified Subsequent to a Post-Hearing Vote****3296-91-R: Teamsters Local Union No. 419 (Applicant) v. W. Ernest Hennessey Holdings Ltd. (Respondent) v. Group of Employees (Objectors)**

Unit: "all employees of W. Ernest Hennessey Holdings Ltd. in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office and sales staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	21
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	8

### Applications for Certification Dismissed Without Vote

**1990-90-R:** United Brotherhood of Carpenters and Joiners of America Local 446 (Applicant) v. George Stone & Sons General Contractors Ltd. (Respondent) (5 employees in unit)

**2423-91-R:** Bakery, Confectionery and Tobacco Workers International Union AFL-CIO-CLC (Applicant) v. R.J.R. MacDonald Inc. (Respondent) (25 employees in unit)

**3842-91-R:** Retail, Wholesale and Department Store Union, AFL-CIO:CLC (Applicant) v. Zellers Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Zellers Inc. at 875 Highland Road, West, in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, security staff, office and clerical staff and students employed on a co-operative training program with a school, college or university" (79 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1714-90-R:** The Society of Ontario Hydro Professional and Administrative Employees (Applicant) v. Ontario Hydro (Respondent) v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union, Local 1000 (Intervenors) v. The Coalition to Stop the Certification of the Society on behalf of certain employees (Objectors)

Unit: "all employees of the respondent employed in the Province of Ontario as professional engineers, engineers, engineers-in-training, scientists, professional, administrative and associated employees save and except persons included on the executive salary payroll and above, and persons in any bargaining unit for which any trade union held bargaining rights as of October 2, 1990" (7550 employees in unit) (*Clarity Notes*)

**3820-91-R:** Communications and Electrical Workers of Canada (Applicant) v. Computer Assembly Systems Ltd. (Respondent)

Unit: "all employees of Computer Assembly Systems Ltd. in the City of Brockville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and engineering staff" (326 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	326
Number of persons who cast ballots	298
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	298
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	113
Number of ballots marked against applicant	180

### Applications for Certification Withdrawn

**0927-91-R:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 822 (Applicant) v. Theatrecorp Ltd., WGC Facility Management Corporation, The Canadian Opera Company (Respondents)

**2850-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Trans Power Utility Contractors Inc. (Respondent)

**3504-91-R:** Office & Professional Employee's International Union, Local 474 (Applicant) v. Sioux Lookout District Health Centre (Respondent)

**3909-91-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Holliday Home Renovation (Respondent)

**4010-91-R:** Laundry & Linen Drivers & Industrial Workers Union Local 847, Affiliated with the International



Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Maple Leaf Gardens, Limited (Respondent)

**4024-91-R:** Canadian Union of Public Employees (Applicant) v. Hamilton Civic Hospitals (Respondent) v. Ontario Nurses' Association (Intervener)

**4067-91-R:** International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Arnone Transport Limited (Respondent) v. Teamsters Union Local 990 (Intervener)

**4081-91-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Culliton Brothers Limited (Respondent) v. Group of Employees (Objectors)

**4104-91-R:** International Union United Plant Guard Workers of America Local 1956 (Applicant) v. Burns International Security Services Limited (Respondent)

**4151-91-R:** Canadian Security Union (Applicant) v. Zellers Inc. (Respondent)

**0056-92-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Quality Manufactured Homes Ltd. (Respondent)

**0057-92-R:** Canadian Union Of Public Employees (Applicant) v. The Children's Aid Society of the County of Essex (Respondent)

**0129-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. R. M. Catering (Respondent)

**0169-92-R:** Shopmen's Local #834 of the International Association of Bridge, Structural and Ornamental Ironworkers (Applicant) v. E. S. Fox Limited (Respondent)

## APPLICATION FOR FIRST CONTRACT ARBITRATION

**4007-91-FC:** Southern Ontario Newspaper Guild, Local 87 (Applicant) v. The Daily Mercury, A Division of Thomson Newspapers Company Limited (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**1185-91-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Margaret's Fine Foods Ltd. and Evans Bakeries Ltd. (Respondents) v. Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Intervener) (*Dismissed*)

**3359-91-R:** The Operative Plasterers' and Cement Masons International Association of the United States and Canada Local 598 (Applicant) v. Toronto Structural Concrete Services Limited and Toronto Structural Group Inc. (Respondents) (*Granted*)

**3417-91-R:** Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Armor Masonry & Precast Limited and Classic Masonry Inc. (Respondents) (*Withdrawn*)

**3460-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Tacc Construction Co. Ltd.; Trans Power Utility Contractors Inc. (Respondents) (*Withdrawn*)

**3634-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Eastend Plumbing Services Ltd. and , H. & L. Mechanical Ltd. (Respondents) (*Withdrawn*)

**3693-91-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Jay Electric Limited and/or Jay Electric 1986, Inc. and/or 117767 Ontario Inc. and/or Kingswood Electric Limited (Respondents) (*Withdrawn*)

**3915-91-R:** International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Spree Painting Contractors Inc. and Robert George Spree c.o.b. as Robert Spree Painting and Decorating (Respondents) (*Dismissed*)

**3982-91-R:** Drywall, Acoustic Lathing Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Supercity Drywall Ltd. and Korekt Drywall Contractors Limited (Respondents) (*Withdrawn*)

**3984-91-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Supercity Drywall Ltd. Korekt Drywall Contractors Limited (Respondents) (*Withdrawn*)

**0024-92-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Clifford Masonry Limited and Clifford Restoration Limited (Respondents) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union Number 172 Restoration Steeplejacks, International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Interveners) (*Dismissed*)

**0051-92-R:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gall Construction Limited, Con-Gen Limited (Respondents) (*Withdrawn*)

## SALE OF A BUSINESS

**1186-91-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Margaret's Fine Foods Ltd. and Evans Bakeries Ltd. (Respondents) v. Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Intervener) (*Dismissed*)

**2672-91-R:** Hotel Employees Restaurant Employees Union Local 75 (Applicant) v. Coopers & Lybrand Limited and Metropolitan Life Insurance Company (Respondents) (*Withdrawn*)

**3360-91-R:** The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 598 (Applicant) v. Toronto Structural Concrete Services Limited and Toronto Structural Group Inc. (Respondents) (*Granted*)

**3417-91-R:** Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Armor Masonry & Precast Limited and, Classic Masonry Inc. (Respondents) (*Withdrawn*)

**3634-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Eastend Plumbing Services Ltd. and H. & L. Mechanical Ltd. (Respondents) (*Withdrawn*)

**3693-91-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Jay Electric Limited and/or Jay Electric 1986, Inc. and/or 117767 Ontario Inc. and/or Kingswood Electric Limited (Respondents) (*Withdrawn*)

**3915-91-R:** International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Spree Painting Contractors Inc. and Robert George Spree c.o.b. as Robert Spree Painting and Decorating (Respondents) (*Dismissed*)

**3982-91-R:** Drywall, Acoustic Lathing Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Supercity Drywall Ltd. and Korekt Drywall Contractors Limited (Respondents) (*Withdrawn*)

**3984-91-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Supercity Drywall Ltd. Korekt Drywall Contractors Limited (Respondents) (*Withdrawn*)

**0024-92-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Clifford Masonry Limited and Clifford Restoration Limited (Respondents) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union Number 172 Restoration Steeplejacks, International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Interveners) (*Dismissed*)

**0050-92-R:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gall Construction Limited, Con-Gen Limited (Respondents) (*Withdrawn*)

## UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

**3808-91-R:** Millworkers Local Union # 802 - United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carl Gyory Petroleum (Respondent) (*Withdrawn*)

**3809-91-R:** Millworkers Local Union #802 - United Brotherhood of Carpenters and Joiners of America (Applicant) v. Victor W Renaud (Respondent) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**3270-91-R:** Yvonne Rancourt (Applicant) v. Hotels, Clubs, Restaurants and Tavern Employees' Union Local 261; Ottawa, Ontario, chartered by the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L., C.I.O., C.L.C. (Respondent) v. Beaver Foods Limited (Intervener)

Unit: "all full-time and part-time employees, save and except manager, chef, office staff, persons above the rank of manager and students employed during the months of June, July and August, and for short-term emergencies" (14 employees in unit) (*Granted*)

Number of persons listed as eligible	13
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	11

**3854-91-R:** The Staff of Alladin Day Care Centre. (Applicant) v. Canadian Union of Public Employees (Respondent) v. Alladin Day Care Centre Inc. (Intervener) (*Granted*)

**3874-91-R:** Dirk Koehler, for the employees of the Cambridge Reporter (Applicant) v. The Southern Ontario Newspaper Guild Unit, Cambridge, Ont. (Local 87) (Respondent) v. Cambridge Reporter (Intervener) (*Dismissed*)

**3958-91-R:** Herman Waeijen (Applicant) v. Local 473 Sheet Metal Workers' International Association (Respondent) v. Ambient Systems (Intervener) (*Dismissed*)

**3980-91-R:** Richard Adduono and Kenneth Adduono (Applicants) v. Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers' International Association, Local 397 (Respondent) v. Adduono's Sheet Metal & Heating Ltd. (Intervener) (*Withdrawn*)

**4014-91-R:** Mr. Jose Manuel Da Rosa (Applicant) v. Labourer's International Union of North America, Local 506 (Respondent) v. Armor Masonry and Precast Ltd. (Intervener) (*Dismissed*)

**4095-91-R:** David Miller (Applicant) v. Independent Canadian Steelworkers Union (Respondent) v. Advanced Monobloc Inc. (Intervener) (*Granted*)



**4128-91-R:** Michael Porter (Applicant) v. The International Brotherhood of Electrical Workers, The IBEW Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 804 (Respondents) v. Fluker Electrical Mechanical, a Division of H. Fluker Consultants Inc. (Intervener) (*Withdrawn*)

**4137-91-R:** Margaret Rafter (Applicant) v. Service Employees International Union Local 268 (Respondent) v. Plummer Memorial Public Hospital (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

**4148-91-R:** Sam Hawco (Applicant) v. United Steelworkers of America Local 9038 (Respondent) v. Pyrene Fire Security Inc. (Intervener) (*Granted*)

**4160-91-R:** Paul Bruzas (Applicant) v. Local 105, The International Brotherhood of Electrical Workers and I.B.E.W. Construction Council of Ontario (Respondents) v. M.T.C. Electric Limited (Intervener) (*Granted*)

**0035-92-R:** Nifast Canada Corporation (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Granted*)

**0040-92-R:** Rudy Denis (Applicant) v. Labourers' International Union of North America, Local 493 and Labourers' International Union of North America (Respondents) v. Acme Building and Construction Limited (Intervener) (*Withdrawn*)

**0101-92-R:** Giovanni Pisanti (Applicant) v. United Steelworkers of America Local 4440 (Respondent) v. Porcupine Powder Company Inc. (Intervener) (*Granted*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE**

**0114-92-U:** Four Seasons Hotels Limited (Applicant) v. International Brotherhood of Painters and Allied Trades, District Council 46 and its Locals 557, 864, 1003, 1080, 1891, 1819, 1630 and 1487; Toronto - Central Ontario Building and Construction Trades Council; John Cartwright and Len Anderson (Respondents) (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)**

**0115-92-U:** Four Seasons Hotels Limited (Applicant) v. International Brotherhood of Painters and Allied Trades, District Council 46 and its Locals 557, 864, 1003, 1080, 1891, 1819, 1630, 1487; Toronto - Central Ontario Building and Construction Trades Council; John Cartwright and Len Anderson (Respondents) (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT**

**3571-91-U:** IWA-Canada Local 1-2995 (Applicant) v. Malette Inc., Malette United Division (formerly United Sawmill Limited) (Respondent) (*Withdrawn*)

**0043-92-U:** Teamsters Local 230, Ready Mix, Building, Supply & Hydro & Construction Drivers, Warehousemen & Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Angelo Natale and Lorenzo Borrelli (Respondents) (*Dismissed*)

## **COMPLAINTS OF UNFAIR LABOUR PRACTICE**

**1590-90-U:** Canadian Union of Public Employees and its Local 3451 (Complainant) v. Heritage Manor (Respondent) (*Dismissed*)

**2315-90-U:** Ray Fontaine (Complainant) v. United Food Commercial Workers Local 114P, Norm Alexander-President, Gunther Howeing-Chief Steward (Respondents) (*Withdrawn*)

- 2929-90-U:** Paul Heath (Complainant) v. Crown in Right of Ontario (Ministry of Corrections) (Respondent) (*Withdrawn*)
- 3054-90-U:** Amalgamated Clothing and Textile Workers Union (Complainant) v. Georgian Industries Inc. (Respondent) (*Withdrawn*)
- 3145-90-U:** Brenda Pennarun - Now - Brenda Casselman (Complainant) v. Michael Borkavich Drugs Limited c/o Shopper's Drug Mart, Store #670 (Respondent) (*Dismissed*)
- 3277-90-U:** Debbie Kavanagh (Complainant) v. C.A.W. Local 1352 (Respondent) (*Dismissed*)
- 3420-90-U:** Amalgamated Clothing and Textile Workers Union (Complainant) v. Georgian Industries Inc. (Respondent) (*Withdrawn*)
- 0774-91-U:** Amalgamated Clothing and Textile Workers Union (Complainant) v. Angelica Uniforms of Canada Ltd. (Respondent) (*Withdrawn*)
- 1400-91-U:** Amalgamated Clothing And Textile Workers Union (Complainant) v. Georgian Industries Inc. (Respondent) (*Withdrawn*)
- 2112-91-U:** United Food and Commercial Workers International Union, Local 175 (Complainant) v. 571252 Ontario Limited (carrying on business as the Red Dog Inn, Fort Frances) (Respondent) (*Dismissed*)
- 2174-91-U:** Angello Malamas (Complainant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Chestnut Park Hotel, Heather Beim (Interveners) (*Dismissed*)
- 2415-91-U:** Hospitality, Commercial and Service Employees Union, Local 73 of the Hotel Employees Restaurant Employees International Union (Complainant) v. Vincenzo and Cosimo Commisso, carrying on business as Magicuts (Respondent) (*Withdrawn*)
- 2454-91-U:** The Ontario Secondary School Teachers' Federation (Complainant) v. The Carleton Board of Education (Respondent) (*Withdrawn*)
- 2684-91-U:** Bakery Confectionery & Tobacco Workers International Union AFL-CIO-CLC (Complainant) v. R.J.R. MacDonald Inc. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)
- 2716-91-U:** Renato Velocci (Complainant) v. International Brotherhood of Electrical Workers, Local Union 1788 and the IBEW Electrical Power Systems Construction Council of Ontario (Respondents) v. Ontario Hydro and The Electrical Power Systems Construction Association (EPSCA) (Interveners) (*Dismissed*)
- 2970-91-U:** Teamsters Local 419 (Complainant) v. 167830 Canada Inc. cob Booth Fisheries (Respondent) (*Withdrawn*)
- 2975-91-U:** Hospitality, Commercial and Service Employees Union, Local 73 of the Hotel Employees Restaurant Employees International Union (Complainant) v. Vincenzo and Cosimo Commisso, carrying on business as Magic Cuts (Respondent) (*Withdrawn*)
- 2994-91-U:** Carpenters And Allied Workers Local 27 United Brotherhood of Carpenters and Joiners Of America (Complainant) v. Byron-Hill Construction Corporation (Respondent) (*Dismissed*)
- 3064-91-U:** John Askin (Complainant) v. Local 220 Staff Association (Respondent) (*Withdrawn*)
- 3110-91-U:** United Food and Commercial Workers Union Local 175/633 (Complainant) v. 888538 Ontario Limited o/a Holiday Inn, Owen Sound (Respondent) (*Withdrawn*)
- 3192-91-U:** Emilio De Santis (Complainant) v. Canadian Union of Public Employees Local 2221, Jim Lynd, Bill Santos (Respondent) v. COSTI: Mario J. Calla (Intervener) (*Dismissed*)

**3368-91-U:** Antonio Barros (Complainant) v. Bricklayers Union of Canada, Local 1 (Respondent) (*Withdrawn*)

**3388-91-U:** John Bradford (Complainant) v. C.U.P.E. 1750 (Respondent) (*Dismissed*)

**3404-91-U:** Rick Thiele, John Beaupre, Kamal Sangar, Robert Harwood (Complainants) v. CAW Local 222, Tom Hoar, Frank Taylor (Respondents) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

**3419-91-U:** Marsha Gail Kriss (Complainant) v. C.U.P.E. Local 79 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

**3506-91-U:** Electrical Contractors Association of Sarnia (Complainant) v. Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, The International Brotherhood of Electrical Workers and The IBEW Construction Council of Ontario (Respondents) (*Dismissed*)

**3572-91-U:** IWA-Canada Local 1-2995 (Complainant) v. Malette Inc., Malette United Division (formerly United Sawmill Limited), Gilles Malette (Respondents) (*Withdrawn*)

**3582-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Loeb I.G.A. Beaverbrook (Respondent) (*Withdrawn*)

**3594-91-U:** Service Employees International Union, Local 204 (Complainant) v. The Willett Hospital and Barry Brown (Respondent) (*Withdrawn*)

**3601-91-U:** Marcel Dagenais (Complainant) v. Canadian Union of Public Employees, C.I.C., Local 152 and Lincoln County Board of Education (Respondents) (*Withdrawn*)

**3613-91-U:** Barbara Mellish Cloutier (Complainant) v. Mr. Cote (Respondent) (*Withdrawn*)

**3616-91-U:** United Food and Commercial Workers International Union, Local 175 (Complainant) v. Budget Car Rentals Toronto Limited (Respondent) (*Withdrawn*)

**3649-91-U:** Evelyn Thornton (Complainant) v. London & District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

**3663-91-U:** Maria Pereira (Complainant) v. Kaufman Footwear and United Rubber, Cork, Linoleum & Plastic Workers of America, Local 88 (Respondents) (*Granted*)

**3696-91-U:** Labourers' International Union Of North America, Local 183 (Complainant) v. Hurley Corporation (Respondent) (*Withdrawn*)

**3729-91-U:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and United Brotherhood of Carpenters and Joiners of America (Complainant) v. Repla Limited (Respondent) (*Withdrawn*)

**3769-91-U:** Samuel Shaw (Complainant) v. International Association of Machinists and Aerospace Workers, Local Lodge 2413 (Respondent) (*Withdrawn*)

**3783-91-U:** Ian De Coste and Phillip Clemente (Complainants) v. Todd Hansen (Associated Freezers of Canada) (Respondent) (*Withdrawn*)

**3793-91-U:** J.P. Bernard (Complainant) v. Ottawa Newspaper Guild (Respondent) (*Withdrawn*)

**3806-91-U:** Andrew Wrona (Complainant) v. United Steelworkers of America (Respondent) (*Dismissed*)

**3821-91-U:** James F. Regan (Complainant) v. Ontario Secondary School Teachers Federation and Scarborough Board of Education (Respondents) (*Withdrawn*)



**3839-91-U:** United Food and Commercial Workers Union, Local 175 (Complainant) v. 888538 Ontario Limited, o/a Holiday Inn, Owen Sound (Respondent) (*Withdrawn*)

**3840-91-U:** United Food and Commercial Workers International Union, Local 175 (Complainant) v. 888538 Ontario Limited o/a Holiday Inn, Owen Sound (Respondent) (*Withdrawn*)

**3851-91-U:** Tom Rawn and Howard Morrison (Complainants) v. Local 834 Bargain Unit and Field Rep. Ken Dosson (URW) (Respondents) (*Withdrawn*)

**3855-91-U:** United Food and Commercial Workers International Union, Local 175 (Complainant) v. Casatta Ltd. c.o.b. as Casatta/Peel (Respondent) (*Withdrawn*)

**3859-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC and its Local 414 (Complainant) v. Educator Supplies Limited c.o.b. as Educator Supplies and Scholar's Choice (Respondent) (*Withdrawn*)

**3902-91-U:** Lorena Vanbiezen (Complainant) v. George Courey Inc. (Respondent) (*Withdrawn*)

**3917-91-U:** Local 440 of RWDSU (Complainant) v. Retail Wholesale and Department Store Union (Respondent) (*Withdrawn*)

**3923-91-U:** Paul Colosimo (Complainant) v. United Steelworkers of America Local 9236-6 (Respondent) (*Withdrawn*)

**3930-91-U:** James P. Wellheiser (Complainant) v. Local 1451 C.A.W (Respondent) (*Withdrawn*)

**3961-91-U:** Mary Anne Green (Complainant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-TCA Canada) (Respondent) (*Withdrawn*)

**3989-91-U:** Ema Cardoso-Lee (Complainant) v. Benefit Plan Administrators Limited (Respondent) (*Withdrawn*)

**3992-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Zellers Inc. (Respondent) (*Dismissed*)

**4003-91-U:** Giovanni Di Santo (Complainant) v. Marble Tile and Terrazzo Union - Local 31 (Respondent) (*Withdrawn*)

**4005-91-U:** David Maycock (Complainant) v. CBRT & GW Local 526 (Respondent) (*Withdrawn*)

**4023-91-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Call-A-Cab Limited (Respondent) (*Withdrawn*)

**4026-91-U:** Sharon Aikens (Complainant) v. Local 1986 C.A.W. Fasco Unit and Frank Emery (Respondents) v. Fasco Motors Limited (Intervener) (*Withdrawn*)

**4069-91-U:** John Harness (Complainant) v. Amalgamated Transit Union Local 113 and Toronto Transit Commission (Respondents) (*Withdrawn*)

**4071-91-U:** Geoffrey Johnson (Complainant) v. C.U.P.E. Local 3261 (Respondent) v. Canadian Union of Public Employees (Intervener) (*Withdrawn*)

**4087-91-U:** Canadian Union of Public Employees (Complainant) v. Village of Winchester (Respondent) (*Withdrawn*)

**4110-91-U:** United Steelworkers of America (Complainant) v. Pathex International Ltd. (Respondent) (*Withdrawn*)

**4118-91-U:** Arthur J. St. Onge (Complainant) v. International Union of Operating Engineers AFL-CIO Local #793 (Respondent) (*Withdrawn*)

**4124-91-U:** Winford (George) Brown (Complainant) v. Toronto Western Hospital (Respondent) (*Withdrawn*)

**4157-91-U:** Luke I. Modusen (Complainant) v. Urban Painting and Decorating Ltd. (Respondent) (*Dismissed*)

**4158-91-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Cedarwood Village (Respondent) (*Withdrawn*)

**4163-91-U:** Kevin Brant (Complainant) v. United Food and Commercial Workers (UFCW) Local 114P (Respondent) (*Dismissed*)

**4168-91-U:** James A MacMillan (Complainant) v. Teamsters Union Local 990 (Respondent) (*Withdrawn*)

**0004-92-U:** Adam Mansouri (Complainant) v. Teamsters Local 938 (Respondent) (*Withdrawn*)

**0039-92-U:** Eric R. Berglund representing the grievors (Complainant) v. Shop-Vac of Canada Inc. (Respondent) (*Withdrawn*)

**0044-92-U:** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Complainants) v. Classic Masonry Inc. and Louis Trindade (Respondents) (*Withdrawn*)

**0045-92-U:** Teamsters Local 230, Ready Mix, Building, Supply, Hydro & Construction Drivers, Warehousemen & Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Angelo Natale and Lorenzo Borrelli (Respondents) (*Dismissed*)

**0100-92-U:** Antoinette Parent (Complainant) v. William Adam and Tim Oribine of the United Food & Commercial Workers Union Local 175 (Respondents) (*Dismissed*)

**0141-92-U:** Paul Formosa (Complainant) v. General Motors of Canada (Respondent) (*Dismissed*)

**0145-92-U:** Mary Rutherford (Complainant) v. Jerry Clifford (Respondent) (*Dismissed*)

**0152-92-U:** John Purtill (Complainant) v. Dominion Colour (Respondent) (*Dismissed*)

**0247-92-U:** Erik Hansink (Complainant) v. General Motors of Canada, Oshawa Truck Plant Management (Respondent) (*Dismissed*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0025-92-M** Work Wear Corp. (Windsor) (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Trade Union) (*Granted*)

## **FINANCIAL STATEMENT**

**1032-91-M:** Maurice Lauzier (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO - Local Lodge 75 (Respondent) (*Withdrawn*)

## **JURISDICTIONAL DISPUTES**

**1292-91-JD:** Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers' International

Association, Local 397 (Complainant) v. Daycon Mechanical Systems Ltd., Millwright District Council of Ontario on its own behalf and on behalf of its own Local 1151 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Dismissed*)

**1480-91-JD:** United Brotherhood of Carpenters and Joiners of America, Local 1256 (Complainant) v. Doug Chalmers Construction Ltd., Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 539 (Respondents) v. Electrical Power Systems Construction Association (Intervener) (*Dismissed*)

**3025-91-JD:** The Association of Allied Health Professionals: Ontario (Complainant) v. Peterborough County-City Health Unit (Respondent) (*Granted*)

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**2144-91-M:** Schneider Office Employees' Association (Applicant) v. J.M. Schneider Inc. (Respondent) (*Withdrawn*)

**3525-91-M:** United Steelworkers of America (Applicant) v. LMH Hotel Operations c.o.b. Ramada Hotel 400/401 (Respondent) (*Dismissed*)

**3819-91-M:** United Food and Commercial Workers Union, Local 175 (Applicant) v. Hornepayne Board of Education (Respondent) (*Withdrawn*)

**3938-91-M:** The Salvation Army Grace General Hospital (Applicant) v. Ontario Nurses' Association Local 158 (Respondent) (*Dismissed*)

**0143-92-M:** CUPE, Local 3152 (Applicant) v. Sault Ste. Marie Board of Education (Clerical) (Respondent) (*Dismissed*)

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT**

**0915-91-OH:** Ron Dawson-North (Complainant) v. Comstock Canada (Respondent) (*Withdrawn*)

**0916-91-OH:** Maurice Doyon (Complainant) v. Comstock Canada (Respondent) (*Withdrawn*)

**2680-91-OH:** Stephen Hardy (Complainant) v. Lily Cups Inc. (Respondent) (*Withdrawn*)

**3390-91-OH:** Gordon H. Duffy (Complainant) v. Thyssen Marathon Canada Ltd. (Respondent) (*Withdrawn*)

**3700-91-OH:** Lloyd Donovan (Complainant) v. Laidlaw Waste Systems Ltd. (Respondent) (*Withdrawn*)

**3742-91-OH:** Jose Ruben Santiago (Complainant) v. Paslode Canada Registered (Respondent) (*Dismissed*)

**3790-91-OH:** Althea Bacquain (Complainant) v. Marcelle (Respondent) (*Withdrawn*)

**3888-91-OH:** James Armstrong, Philip Armstrong, Marv Breen, James Canning, Peter Clark, Duane Darke, David Donaldson, Ron Dorschu, Robert Fiander, Gord Fletcher, George Griffin, Murray Grummitt, Samih Hajjar, Gordon Heimbuch, David Mark Henderson, Ron Hunt, Robert Hutchings, Thomas Kalles, Gordon Lynde, Frank McAuley, James Mandia, John Meikel, David Nurse, Roy Pannell, James Pinnock, Christian Pitcher, Thomas Price, Thomas E. Price, Jim Rennie, Nicola Romano, Tom Smith, Wallace Smith, Donald Todd, Colin Vaughn and Alan Williams (Complainants) v. Calorific Construction Limited (Respondent) (*Withdrawn*)

**0015-92-OH:** Hugh Rudden (Complainant) v. Ontario Hydro (Construction) (Respondent) (*Withdrawn*)

**0026-92-OH:** Phillip Welbergen (Complainant) v. Village of Winchester (Respondent) (*Withdrawn*)



**0032-92-OH:** Brian Sanderson (Complainant) v. Wetmore Welding Supplies Ltd. (Respondent) (*Withdrawn*)

**0060-92-OH:** Claudette Cross (Complainant) v. Algonquin Nursing Home (Respondent) (*Withdrawn*)

**0130-92-OH:** Danny Tosolini (Complainant) v. Ontario Hydro Society (Respondent) (*Dismissed*)

**0192-92-OH:** Brian Sanderson (Complainant) v. Wetmore Welding Supplies Ltd. (Respondent) (*Dismissed*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**0476-89-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Marantonio Plastering Ltd. (Respondent) (*Dismissed*)

**0972-90-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Pavex Canada Ltd. (Respondent) (*Granted*)

**2477-90-G:** United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. George Stone & Sons General Contractors Ltd. (Respondent) (*Granted*)

**0224-91-G:** Millwright District Council of Ontario on its own behalf and on behalf of its Local 1151 (Applicant) v. Daycon Mechanical Systems Ltd. (Respondent) v. Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 397 (Intervenors) (*Dismissed*)

**0265-91-G; 0266-91-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Robert Globe Electrical and Mechanical Limited (Respondent); Sheet Metal Workers' International Association, Local 537 (Applicant) v. Robert Globe Electrical and Mechanical Limited (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Intervenors) (*Withdrawn*)

**0571-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Canal contractors (a division of Canadian Shipbuilding and Engineering Ltd.) (Respondent) (*Dismissed*)

**0756-91-G:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

**0762-91-G:** The Electrical Power Systems Construction Association (Applicant) v. Ontario Allied Construction Trades Council, International Association of Heat and Frost Insulators and Asbestos Workers, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and James C. Cord (Respondents) (*Dismissed*)

**1721-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Vantage Sheet Metal (Respondent) (*Withdrawn*)

**1762-91-G:** United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Cope Construction Co. (Respondent) (*Withdrawn*)

**1931-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Gage Metal Cladding Limited and G & J Metal Erectors Ltd. (Respondents) (*Withdrawn*)

**1969-91-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Nicholls Radtke & Associates Ltd. (Respondent) v. Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 (Intervener) (*Withdrawn*)

**2092-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Dayus Roofing Co. Ltd. (Respondent) (*Withdrawn*)

**2093-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Vixman Construction Ltd. (Respondent) (*Withdrawn*)

**2254-91-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Nicholls-Radtke & Associates Ltd. (Respondent) v. Millwrights District Council of Ontario on its own behalf and on Behalf of its Local 1244 (Intervener) (*Withdrawn*)

**2378-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ritin Construction (Respondent) (*Withdrawn*)

**2392-91-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Bondfield Contracting Ltd. (Respondent) (*Granted*)

**2449-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Dalacoustic Contractors Limited (Respondent) (*Granted*)

**3029-91-G:** The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. De Grandis Painting Ltd. (Respondent) (*Withdrawn*)

**3050-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Roman Roofing (Respondent) (*Withdrawn*)

**3416-91-G:** Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Armor Masonry & Precast Limited and Classic Masonry Inc. (Respondents) (*Withdrawn*)

**3503-91-G:** Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. CTM Ceramics International Inc. (Respondent) (*Granted*)

**3537-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. M. P. Lundy Construction (Ontario) Ltd. (Respondent) (*Withdrawn*)

**3640-91-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Bothwell Accurate Limited (Respondent) (*Withdrawn*)

**3651-91-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Symetrical Drywall Interiors Limited (Respondent) (*Granted*)

**3660-91-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Big H. Construction, a Division of Big H. Limited (Respondent) (*Withdrawn*)

**3676-91-G:** Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Queenslea Drywall & Acoustics Ltd. (Respondent) (*Granted*)

**3714-91-G:** Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Aldershot Flooring Limited (Respondent) (*Granted*)

**3722-91-G:** Labourers International Union of North America, Local 607 and Labourers International Union of North America (Applicant) v. O.J. Pipelines Inc. (Respondent) (*Withdrawn*)

**3776-91-G:** Sheet Metal Workers' International Association Local No. 30 (Applicant) v. Provincial Sheet Metal Limited (Respondent) (*Granted*)

**3795-91-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aldershot Flooring Ltd. (Respondent) (*Granted*)

**3868-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. D & R Ventura General Construction Ltd. (Respondent) (*Granted*)

**3901-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Sapacon Drywall Ltd. (Respondent) (*Withdrawn*)

**3935-91-G:** Carpenter Union 249, Kingston Ont. and the Ontario Provincial Council United Brotherhood of Carpenters and Joiners of America (Applicant) v. Avenue Structures (Respondent) (*Withdrawn*)

**3942-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Les Construction Benoit Larrivee Ltee (Respondent) (*Withdrawn*)

**3943-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Les Entreprises D.V. (Respondent) (*Withdrawn*)

**3944-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Advance Drywall Ltd. (Respondent) (*Withdrawn*)

**3967-91-G:** Teamsters Local Union 91 (Applicant) v. Delta Catalytic Corporation (Respondent) (*Dismissed*)

**3977-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Thomas Fuller Construction Co. (1958) Limited (Respondent) (*Withdrawn*)

**4020-91-G; 4121-91-G; 4122-91-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. City Acoustics Limited (Respondent) (*Granted*)

**4021-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Kor-Ban Inc. (Respondent) (*Withdrawn*)

**4034-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Townwood Homes Ltd. (Respondent) (*Granted*)

**4037-91-G:** International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. The Electrical Power Systems Construction Association and Sheaffer-Townsend (Respondents) (*Withdrawn*)

**4063-91-G:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Metro Concrete Floors (1990) Inc. (Respondent) (*Granted*)

**4068-91-G:** The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1671 (Applicant) v. Builders Choice Siding and Windows (Respondent) (*Granted*)

**4082-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Marlee Electric Limited (Respondent) (*Granted*)

**4093-91-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Avram's Metalworks (Respondent) (*Granted*)

**4098-91-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Modern Trend Design & Interior Renovations (Respondent) (*Granted*)

**4119-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. 833359 Ontario Ltd. Pacific Hardwood Flooring (Respondent) (*Withdrawn*)

**4120-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rita Forming (Respondent) (*Granted*)



**4133-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Murphy and Morrow Limited (Respondent) (*Withdrawn*)

**4134-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Belmar Construction Limited (Respondent) (*Granted*)

**4159-91-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Delmar Contracting Limited (Respondent) (*Granted*)

**0010-92-G:** Christian Labour Association of Canada (Applicant) v. Stephens & Rankin Ltd. (Respondent) (*Withdrawn*)

**0012-92-G:** Operative Plasterers and Cement Masons, Local 124 (Applicant) v. Dalacoustic Contractors Limited (Respondent) (*Granted*)

**0020-92-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. Danruss Contracting (1985 Windsor) Inc. (Respondent) (*Granted*)

**0023-92-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

**0052-92-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gall Construction Limited and Con-Gen Limited (Respondents) (*Withdrawn*)

**0053-92-G:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Crete Flooring Groups Limited (Respondent) (*Granted*)

**0080-92-G:** Sheet Metal Workers' International Association, Local No. 30 (Applicant) v. Automatic Erectors Ltd. and Automatic Erectors Ltd. (R/D & S) (Respondents) (*Granted*)

**0108-92-G:** Labourers' International Union of North America, Local 506 (Applicant) v. James A. Rice Ltd. (Respondent) (*Withdrawn*)

**0140-92-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Huffman Bros. Welding Limited (Respondent) (*Granted*)

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**0902-90-U:** Kermit Mitchell (Complainant) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)

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***Ontario Labour Relations Board,  
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

June 1992





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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
Ontario Labour Relations Board

Cited [1992] OLRB REP. JUNE

EDITOR: RON LEBI

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
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ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 .....

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Termination - Petition - Only one person in bargaining unit for purpose of the count and that person signing petition - Board determining that employer interfered with origination of termination application and that petition not voluntary expression of employee wishes - Application dismissed

BILL BAILEY OF BELLEVILLE LIMITED; RE ROBERT HARRY MACKLIN; RE U.A.....

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Termination - Petition - Local union officials circulating petition in support of termination application - Although many signatures on petition obtained on company premises during working hours, circumstances not such that employees would reasonably perceive that petition supported by management or that names of employees who declined to sign would become known to management - Collective agreement indicating that it was entered between employer and national union and its local - Board determining that petition naming only national union not defective - Board satisfied that petition voluntary and directing representation vote

DOMTAR INC.; RE STEPHEN STACEY AND FRANK KING; RE THE C.P.U. AND ITS LOCAL 934 .....

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Termination - Petition - Union certified pursuant to section 8 of the *Act* in 1989 - Board noting need to be sensitive to lingering effects of egregious unfair labour practices on likelihood of employees voluntarily seeking to decertify union at first available opportunity thereafter - In all the circumstances, Board concluding that petition not voluntary - Application dismissed

ROYCE DUPONT POULTRY PACKERS; RE ELIZABETH GIERASIMCZUK; RE U.F.C.W., LOCAL 175 .....

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Union seeking "all-employee" bargaining unit - Bargaining Unit - Certification - Employer and objecting employees taking position that "office and clerical staff" should be treated as separate bargaining unit - Board applying *Hospital For Sick Children* test - Board finding that employees in unit sought sharing sufficiently coherent community of interest that they should be able to bargain together on a viable basis - Board determining that "all-employee" unit appropriate

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Unfair Labour Practice - Duty of Fair Representation - Union grieving permanent lay-off of 52 employees - Some employees signing release in order to receive immediate severance pay and, consequently, withdrawing their claims under grievance procedure - Union subsequently settling grievance, securing monetary compensation on top of severance pay - Whether union violated *Act* when it failed to tell employees before they signed releases that a few days later there would or might be a settlement giving remaining grievors more monetary compensation - Complaint dismissed

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Unfair Labour practice - Settlement - Complainant filing identical complaint to one filed almost one year earlier - Earlier complaint withdrawn in circumstances which respondents submitted amounted to settlement - Board determining that earlier complaint had been settled and, accordingly, dismissing subsequent complaint

H. JOHN BARNES; RE L.I.U.N.A., LOCAL 527, AND BERNARDINO CARROZZI.. 668





**0209-92-OH Leonard Perry, Complainant v. Ab Cox Pontiac Buick GMC Ltd., Respondent**

**Adjournment - Health and Safety - Practice and Procedure - Complainant's counsel writing to Board on the day before hearing seeking adjournment on the ground that he was not ready to proceed - Neither complainant nor his counsel appearing at hearing - Board not satisfied that adjournment justified for several reasons, including fact that request not made in a timely manner - Complaint dismissed**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *K. Davies*.

**APPEARANCES:** *Albert Cox* and *Heather McKay* for the respondent; no one appeared at the hearing on behalf of the complainant.

**DECISION OF THE BOARD; June 11, 1992**

1. In this complaint, under what is now section 50 (formerly section 24) of the *Occupational Health and Safety Act*, the complainant asserts that he was treated in a manner contrary to subsection 50(1) of that Act. It was dismissed (orally) by the Board at a hearing convened on May 28, 1992.

2. The complaint, which is dated April 16, 1992 and was filed with the Board on April 21, 1992, was scheduled to be heard on May 28, 1992. By letter from counsel (addressed to the Labour Relations Office assigned to the matter) dated and delivered May 27, 1992, the complainant sought an adjournment of that hearing as follows:

I confirm our conversation of today's date in which I advised you that, despite our requests for disclosure of information regarding the breaches of safety standards, which have been the subject of Ministry of Labour inspections and reprimands, we have not been provided with that information to date. As a consequence we are not in a position to proceed with Mr. Perry's complaint before the Board. I enclose copies of our letters requesting disclosure, faxed on May 4, 1992.

I have requested that the defendant corporation, in particular Mr. Cox himself, consent to an adjournment of the hearing of this matter in order to permit us to be properly informed and to be able to advise the board of the extent of the breaches. Clearly it is not in their interest to do so. However, Mr. Perry's position is being seriously prejudiced by the failure of the Ministry to respond and his ability to present his case is seriously curtailed.

As indicated in the second attached letter, we also requested disclosure of any documentation which the Board may have received from the defendant regarding this matter. We have not received a response to date.

We would ask the board to grant an adjournment on the basis that Mr. Perry's position with regards to presentation of evidence is curtailed, not by his own actions or inaction. As the key to the issue before this hearing is the employer's failure to provide safe equipment and instruction resulting in the subsequent accident, we would ask the board to grant us an adjournment, despite the objections of the employer/defendant in this matter.

We would ask for confirmation of your receipt of this request and confirmation of the adjournment, if it is granted. As Mr. Perry is a man of modest means, it is not our intention to attend, thus incurring further expense to Mr. Perry at this time.

3. The respondent opposed the complainant's request.

4. Neither the complainant nor anyone on his behalf appeared at the May 28, 1992 hearing. The respondent appeared and maintained its objection to any adjournment. The respondent advised the Board that it was ready to proceed and had expended considerable time and effort to become prepared to do so.

5. Upon considering the material before the Board and representations of the respondent, the Board denied the complainant's request for an adjournment.

6. Matters which come before the Board under the *Occupational Health and Safety Act* are labour relations matters. It is well understood that labour relations delayed are labour relations defeated and denied (*Journal Publishing Co. of Ottawa et al v. Ontario Newspaper Guild, Local 205, OLRB et al*, [1977] 1 ACWS 817 (Ontario Court of Appeal)) and that delay works unfairness and hardship in labour relations matters (*Re: United Headwear and Biltmore/Stetson (Canada) Inc.*, (1983) 41 O.R. (2d) 287). In recognition of the need to proceed with labour relations matters expeditiously, it is the Board's well-established practice not to grant adjournments except on consent of all parties, or where the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate.

7. Subsection 50(1) of the *Occupational Health and Safety Act* provides that:

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

8. This complaint refers to no other legislative provision. It contains ten allegations which include allegations that the complainant was discharged and otherwise treated improperly by the respondent because he sought enforcement of the *Occupational Health and Safety Act*.

9. The complainant's adjournment request was based on the assertion that he was not prepared to proceed. However, the complainant, and his counsel, felt sufficiently well informed of the factual and legal basis for the complaint to file it, some three months after the alleged improper discharge. Counsel also felt sufficiently well prepared to advise the Labour Relations Officer assigned to the complaint, by letter dated May 4, 1992 (over three weeks before the scheduled hearing), that the complainant and counsel would be attending before the Board on May 28, 1992 and expected "... to present *viva voce* and documentary evidence at that time."

10. In the same letter, counsel asked what disclosure, presumably from the respondent, "may" be appropriate, and whether the Board's rules require disclosure of documentary evidence *by the complainant* to the respondent. In addition, by letter also dated May 4, 1992, counsel wrote to the Ontario Ministry of Labour's Freedom of Information Privacy Protection Office confirming a receipt of a report "in respect of an inspection which was done of the subject employer on January 31, 1992" (i.e. subsequent to the discharge complained of) and seeking production of docu-



ments indicating whether or not “modifications” were made in response to that report and what fines were imposed as a result of any failure to make required modifications.

11. There is nothing before the Board which indicated that the complainant, or counsel, had done anything to follow up either letter, or to otherwise obtain and ensure the presence of witnesses or evidence they considered necessary at the May 28, 1992 hearing. More specifically, there was no indication that there was any inquiry made directly of the Occupational Health and Safety Branch of the Ministry of Labour, or that any attempt was made to communicate directly with the respondent for either information or other purposes. Nor was there any indication that there was any specific evidence or witness(es) of which the complainant was aware but which he had been unable to obtain for the hearing.

12. The Ontario Labour Relations Board is a quasi-judicial administrative tribunal responsible for adjudicating disputes which are brought before it pursuant to various pieces of legislation, including the *Occupational Health and Safety Act*. Although the Board does employ Labour Relations Officers whose functions include attempting to assist parties to settlement, it is not part of the Board's function to investigate complaints or to otherwise advise or assist a party to a proceeding. It is the responsibility of every party involved in a proceeding before the Board to inform itself of the relevant legislation and the Board's Rules and Procedures in that respect. It is also the responsibility of every party to prepare its case by conducting the appropriate investigations and research, and to marshal and present to the Board the evidence and argument it wishes the Board to consider.

13. In this case, we considered that subsection 50(5) of the *Occupational Health and Safety Act* provides that, in a complaint like this one, the respondent bears the onus of proving that it did not act in a manner contrary to subsection 50(1). Further, the complainant's own material indicates that it was in possession of *viva voce* and documentary evidence, and that he was, until the day before the hearing, prepared to attend the May 28, 1992 hearing to present that evidence. On the other hand, there was nothing before the Board which indicated that there was cogent evidence which the complainant had been unable to obtain despite having made reasonable efforts to do so. Nor was there any indication that there had been insufficient time for the complainant to properly investigate and prepare his complaint for hearing. Finally, the adjournment was not requested in a timely manner. In the result, the Board was not satisfied that an adjournment was justified, and the complainant's request for one was therefore denied.

14. Upon hearing the Board's ruling in that respect, the respondent asked that the complaint be dismissed. There appeared to be no reason to not do as the respondent requested and the Board therefore dismissed the complaint.

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**1222-91-U; 2010-91-U H. John Barnes, Complainant v. Labourers' International Union of North America, Local 527; Bernardino Carrozzi, Respondents**

**Settlement - Unfair Labour practice - Complainant filing identical complaint to one filed almost one year earlier - Earlier complaint withdrawn in circumstances which respondents submitted amounted to settlement - Board determining that earlier complaint had been settled and, accordingly, dismissing subsequent complaint**

**BEFORE:** *Bram Herlich*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

**APPEARANCES:** *L. E. Leblanc*, *H. John Barnes*, *Manuel Martins*, *Jos 2i Martins* and *Anthony Malheiro* for the complainant; *A. M. Minsky* and *B. Carrozzi* for the respondent.

**DECISION OF BRAM HERLICH, VICE-CHAIR, AND BOARD MEMBER D. A. PATTERSON;**  
June 2, 1992

1. The style of cause in this matter is hereby amended to reflect the correct name of the respondent union as: Labourer's International Union of North America, Local 527 (hereinafter referred to as the "union").
2. This is a complaint under section 91 [formerly section 89] of the *Labour Relations Act* alleging violation of sections 69, 70 and 71 [formerly sections 68, 69 and 70] of the Act.
3. It is common ground that this complaint is identical to a prior complaint between the same parties filed under the same provisions of the Act (Board File 1222-91-U, July 25, 1991). That complaint was withdrawn by leave of the Board in circumstances which the respondents submit amounted to a final settlement of the dispute between the parties. It was not disputed that a settlement of the prior complaint would be a bar to the current proceedings. The complainant disputes that the events culminating in the withdrawal of the prior complaint constitute a settlement of that complaint.
4. In addition to a number of documents filed as exhibits the Board heard the evidence of Daniel Randazzo, counsel to the respondent union; Manuel Martins, a former president of the union who testified on behalf of the complainant; and of H. John Barnes, the complainant. Each of these individuals gave evidence regarding the meeting they all attended which had been convened by the Labour Relations Officer and which culminated in the withdrawal of the prior complaint. In coming to its findings of fact the Board has carefully considered all of the evidence before it and taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers, and what seems most probable in all the circumstances. Having said that, however, it is useful to point out that while there were some inconsistencies between the evidence of the complainant and the respondents (indeed, there were certain inconsistencies between the evidence of the two witnesses who testified on behalf of the complainant), we are not of the view that there were major or significant disparities in the various recountings of the events observed by the witnesses. There are, however, differences in the characterizations the parties urge us to draw of the events in question and of the complainant's subjective state of mind in withdrawing the complaint.
5. The material allegations included in the prior complaint were as follows:

## APPENDIX I

ON OR ABOUT MID-NOVEMBER 1990 THE GRIVOR [sic] WAS DEALT WITH BY LABOURERS INTERNATIONAL UNION, LOCAL 527; B. CARROZZI (SECRETARY-TREASURER/BUSINESS MANAGER) OF THE RESPONDENT CONTRARY TO THE PROVISIONS OF SECTION(S) 68, 69 AND 70 OF THE LABOUR RELATIONS ACT IN THAT HE DID ON HIS OWN BEHALF OR ON BEHALF OF THE RESPONDENT:

(In reference to my complaint under section(s) 68 and 69 of the Labour Relations Act:)

Did knowingly and with intent choose to advance one Paul LeBlanc on the "Out Of Work List" ahead of myself (H. John Barnes). This advancement on the list enabled Paul LeBlanc to procure gainful employment to the detriment of the Complainant.

Mr. Paul Leblanc, had been employed with BRILOCK CONSTRUCTION CO. for a period of approx. five (5) years and was terminated on or about mid-November 1990. Upon termination his name was placed on the "Out of Work List". He was on this list until approx. mid-December 1990 whereupon he was offered gainful employment as a labourer, with V. K. MASON CONST. CO.. To the best of my knowledge he continues to be employed as a labourer with the aforementioned company.

My complaint centers around the fact that I have been on the aforementioned "Out of Work List" since mid-July 1990 and was not offered the position with V. K. MASON CONST. CO.

(In reference to my complaint under section 70 of the Labour Relations Act:)

Did knowingly and with intent, through the use of threats of internal union charges against the complainant seek to intimidate the complainant who has been a member for seven (7) years.

These charges have never been made available to the complainant in a written format and are therefore difficult to address. The constitution of the Labourers International Union Local 527 clearly states that any member charged internally under the Union constitution has a right to due process, which includes a copy of any charges filed against him (within thirty (30) days) and a hearing.

The implication has been that should I be found guilty on any of the implied charges my membership within local 527 Labourers Union would be terminated.

The insinuation on the part of the respondent that these charges are or would be forthcoming constitutes coercion and intimidation on the part of the respondent against the complainant.

The Respondents actions both in terms of his implied manipulation of the "Out of Work List" coupled with the implication that internal charges may be pending would certainly lead me to believe that some effort is being made to ensure my compliance through the use of intimidation and coercion.

6. The Labour Relations Officer authorized by the Board to inquire into the complaint and to endeavour to effect a settlement pursuant to section 91(2) [formerly section 89(2)] of the Act convened a meeting of the parties on July 25, 1991 in Ottawa. Daniel Randazzo, union counsel; Bernardino Carrozzi, respondent and business manager/secretary treasurer of the union; and Gerry Mullin, recording secretary and field representative of the union were in attendance at the meeting on behalf of the respondents. Attending on behalf of the complainant were the complainant, Manuel Martins and Jim Krocko, a friend of the complainant. Also in attendance at the commencement but not for the duration of the meeting were representatives of V. K. Mason Construction Co. as well as a representative of the Ottawa Construction Association.

7. The entire meeting lasted approximately 75 to 90 minutes. The complainant began outlining his concerns with a reference to an allegation that persons were being improperly admitted



to membership in the union. Mr. Randazzo objected saying that allegation was not contained in the complaint before the Board and that the union had come prepared only to deal with the contents of that complaint. Mr. Barnes then went on to raise matters related to the impugned referral of Paul Leblanc and also complained that he had been unable to contact Mr. Carrozzi to discuss matters. The complainant went on to refer to the internal union charges filed against him. Mr. Randazzo explained why the union felt there was no impropriety in the referral of Mr. Leblanc and provided some documentation (although it is not clear from the evidence whether these were actual documents related to the referral or simply the union's formal written reply to the complaint) and assured the complainant that the out of work list was not a secret inaccessible document. Mr. Randazzo further explained that the union has an "open door" policy and assured Mr. Barnes that if he made a phone call to the office an appointment could be made to meet with Mr. Carrozzi. With respect to the internal union charges, Mr. Randazzo addressed what he felt was Mr. Barnes' significant, if not primary, concern at not having received a copy of any charges. Reference was made to section 2 of Article XII of the Uniform Local Union Constitution of the Labourers' International Union of North America and Mr. Barnes was assured that he was entitled to and would receive a copy of any internal charges prior to any hearing and trial of those charges but that no hearing and trial had yet been scheduled.

8. After this discussion the parties were separated and the Labour Relations Officer spent 20 to 30 minutes in discussion with the complainant. When the parties subsequently reconvened Mr. Barnes indicated that he believed he was in the wrong forum. The parties subsequently executed a document jointly requesting leave of the Board to withdraw the complaint. That request resulted in the decision of the Board already referred to in which the complaint was withdrawn by leave of the Board.

9. Three days later the complainant prepared a covering letter which stated, in part:

Enclosed you will find a complaint that I am resubmitting to the Labour Relations Board. I am not satisfied that the information I was given at my initial hearing of July 25, 1991, was in fact accurate. With this in mind I have decided to ask for a new officer to look into the charges herein enclosed. These charges relate to sections 68, 69, and 70 of the Labour Relations Code [sic].

10. The complainant attached what the parties agree is a complaint identical to the prior complaint to his covering letter and filed these documents with the Board. Although the Board might have treated this as a request for reconsideration in the prior complaint, it was processed as a new matter.

11. Returning briefly to the events at the July 25th meeting, the complainant gave evidence regarding his state of mind and intention in agreeing to the withdrawal of the prior complaint. While that evidence may not all be logically consistent it is clear that he was unhappy with what he perceived to be the unwarranted lack of enthusiastic support he received from the Labour Relations Officer regarding the merits of his complaint. And although he appeared to acknowledge that he could have asked that the complaint be advanced to a hearing before the Board, he also testified he believed, based, at least in part, on his discussions with the Labour Relations Officer, that the *only* way he could have his complaint heard by the Board was to withdraw and subsequently refile it. There was, however, no evidence that he in any way expressed this view to the respondents and it is not surprising that at the end of the day they, as Mr. Randazzo testified, were of the view that the matter had been resolved.

12. The respondents urged us to conclude that the prior complaint had been settled and that the current matter should therefore not be permitted to proceed. They pointed to the deci-

sions of the Board in *Crown Electric*, [1978] O.L.R.B. Rep. April 344; *Bot Construction (Canada) Limited*, [1982] O.L.R.B. Rep. Dec. 1811 and *Madeleine Cloutier*, [1988] O.L.R.B. Rep. April 375 as authorities supporting their position. The complainant did not dispute the consequences of a Board finding that the prior complaint had been settled, but urged us not to conclude that the prior matter had been settled.

13. Having considered the evidence and the representations of the parties the Board concluded and ruled orally at the hearing in this matter that the prior complaint had been settled, that the preliminary objection of the respondents was upheld and that the present complaint was consequently dismissed.

14. This was not a case where a unilateral withdrawal is filed by a complainant prior to any formal settlement discussions. Rather, the withdrawal follows, or perhaps more accurately, is the immediate culmination of settlement discussions conducted under the auspices of a Labour Relations Officer. Where a signed joint request for the withdrawal of a complaint is the immediate result of an officer's meeting, a signatory to such a request may have difficulty persuading the Board that the next step contemplated by the parties, or by any one of them, is a hearing before the Board.

15. In any event, we were unable to accept the complainant's evidence and submissions that at the conclusion of the meeting he intended to pursue the matter and that he genuinely, if mistakenly, believed that the *only* manner of achieving that end was to withdraw and refile his complaint. We found that conclusion to be improbable for a number of reasons. First of all the complainant, a past president of the union, is no stranger to labour relations proceedings and the conclusion urged upon us is inconsistent with his acknowledgement that he could, on the day of the meeting, have asked that his complaint be listed for hearing before the Board. The conclusion urged upon us is also difficult to reconcile with the information provided to the complainant in advance of the July 25th meeting. The Registrar's letter advising the complainant of the appointment of a Labour Relations Officer makes it quite clear that (unless the matter is settled) a hearing will be scheduled after the meeting with the Labour Relations Officer. Finally, and perhaps most significantly, there was simply no evidence that the complainant's representative was able to point to of anything the complainant did or said during the course of the meeting that was in any way inconsistent with the conclusion that the matter had been resolved.

16. While explicit written executed settlement documents are undoubtedly a preferred settlement vehicle (see for example the provisions of section 91(7)), cases such as *Bot* and *Cloutier* (both cited above) make it clear that the Board may find that a complaint or a grievance has been settled even in the absence of a formal settlement document. Having reviewed the evidence before it, the Board was satisfied in this case that, at the end of the meeting between the parties on July 25th, there were no issues arising out of the prior complaint which remained to be litigated before the Board. Neither is it our primary function, in the context of this case, to inquire into the sufficiency of the settlement. Rather, we were satisfied that on the basis of some explanations, information, and undertakings regarding further meetings between the parties the complainant (not unlike the complainant in *Cloutier*) agreed to withdraw his complaint. It was for these reasons that we ruled orally that the prior complaint had been settled and consequently dismissed the present complaint which the parties had agreed was identical to the complaint which we found had been settled.

17. While not strictly necessary as the basis of our ruling an additional comment is in order. It is not in the least clear that the complainant in this case would have fared any better had the Board been convinced, as the complainant's covering letter suggests, that the prior complaint was

deliberately withdrawn and refiled so as to gain access to a Labour Relations Officer perceived to be more sympathetic to the complaint's position. It is less than likely that the Board would look favourably upon a party who deliberately manipulates or arguably abuses the Board's processes in order to select or reject a Labour Relations Officer or, indeed, a panel of the Board assigned to deal with or hear a case.

18. Finally, and in fairness to the complainant, we should note that our decision in this matter of course deals only with instant complaint (which the parties agreed was identical to the prior complaint) and not with any other or subsequent matters between the parties.

**DECISION OF BOARD MEMBER R. W. PIRRIE; June 2, 1992**

1. As indicated when the Board gave its oral ruling at the April 14, 1992 hearing, I dissent from this decision.

2. There are two aspects of the July 25, 1991 meeting which led me to the conclusion that the Board should have heard Mr. Barnes complaint.

3. First, my interpretation of the evidence we heard concerning the July 25, 1991 meeting led me to the conclusion that the initial complaint had not been settled. At that meeting Mr. Randazzo, of behalf of the union, explained to the Complainant the union's procedure in using the "out of work list", and the union's interpretation of Article XII of the Uniform Local Union Constitution and more particularly Section II of Article 12.

4. These two areas dealt with the issues raised by the Complainant. Having done so Mr. Randazzo assumed Mr. Barnes agreed. Not the case according to Mr. Barnes, and I must agree. For example what Mr. Randazzo did concerning the second issue was explain to Mr. Barnes that in accordance with the constitution he would receive a copy of the union's charges against him when the executive board set a date for his hearing and trial. That explanation in no way addresses Mr. Barnes complaint under Section 71 (formerly Section 70), i.e. that the union was using the threat of the charges and the possibility that they could lead to the termination of his membership in the union to coerce and intimidate him.

5. In this regard, I do not take the majority's decision at paragraph 8 to prevent Mr. Barnes from filing a future Section 91 complaint against the union if the union files charges against Mr. Barnes subsequent to those extant at July 25, 1991, and Mr. Barnes feels and can demonstrate on a prima facie basis that those charges are intended to coerce and intimidate him contrary to the provisions of Section 71 of the Act.

6. Secondly, in my view there is sufficient reason to believe that Mr. Barnes genuinely misunderstood the context of the Labour Relations Officer's comments concerning "withdraw and refile" as being the appropriate course for him to follow.

7. I am satisfied there was sufficient doubt concerning the events of the July 25, 1991 meeting that I would not have upheld the union's preliminary objection.

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**0207-92-R** Robert Harry Macklin, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Respondent v. **Bill Bailey of Belleville Limited**, Intervener

**Petition - Termination - Only one person in bargaining unit for purpose of the count and that person signing petition - Board determining that employer interfered with origination of termination application and that petition not voluntary expression of employee wishes - Application dismissed**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

**APPEARANCES:** *William W. Walker* and *Robert H. Macklin* for the applicant; *A. J. Ahee* and *B. Christie* for the respondent; *Alan Whyte* and *Barry Box* for the intervener.

**DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG;** June 16, 1992

1. In this application, Robert Macklin seeks an order terminating the bargaining rights held in the I.C.I. sector of the construction industry by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 ("Local 463") and the other affiliated bargaining agents for the intervener, Bill Bailey of Belleville Limited.

2. This application was filed on April 21, 1992. In its Reply dated April 30, 1992 Local 463 indicated that the approximate number of employees in the unit was 1. After discussing the issues in the case with a Waiver Officer, the parties agreed to waive the Officer meeting scheduled for May 15, 1992 and proceed directly to hearing. In discussions with the Waiver Officer, the parties agreed to the description of the bargaining unit and also agreed that there were three issues that would be dealt with at the hearing, namely:

- (a) the voluntariness of the petition;
- (b) whether the applicant can properly bring the application, and
- (c) whether the applicant was performing bargaining unit work on the application date.

The Waiver Officer advised the parties that there was one person in the unit for purposes of the count and that person signed the petition.

3. At the outset of the hearing, counsel for Local 463 raised an issue for the first time concerning the number of persons employed in the bargaining unit on the application date. Based on some hearsay information, counsel advised the Board that his client believed there may have been more than one person employed in the bargaining unit on the application date. Local 463 was not then in a position to provide the Board with the names of these persons. Counsel wanted the opportunity to call someone employed by the respondent to give evidence on this issue. After entertaining the parties' representations and after recessing to consider the matter, the Board ruled orally at the hearing that it would not permit Local 463 to pursue the issue of whether there was more than one person employed in the bargaining unit on the date of application. As a result of discussions with the Waiver Officer, it appears that the parties were agreed that there was only one person in the bargaining unit on the application date. It was the Board's view that Local 463 should

not be permitted to resile from that agreement. But even if one could say that Local 463 did not agree on the list issue, the Board was satisfied that Local 463 had not exercised due diligence in pursuing the list issue, and the raising of the issue in the form it did on the day of the hearing was untimely. The Board then proceeded to deal with the three issues identified as issues in dispute by the Waiver Officer.

4. As noted earlier, Local 463 took the position that Mr. Macklin did not have status to bring this application. The Board asked counsel for the respondent to provide the Board and the other parties with the facts it relied upon in support of its position. The respondent asserted that Mr. Macklin was not a member in good standing having regard to the provisions of the union's constitution which provides that the General Secretary-Treasurer shall issue an applicant a membership card. Mr. Macklin had not been issued a membership card, and since the collective agreement provides that as a condition of employment an employee must be in good standing with the union, counsel for Local 463 maintained that Mr. Macklin was not employed in the bargaining unit and could not bring this application.

5. After certification in February 1991, Local 463 gave Mr. Macklin the option to pay his initiation fee (which exceeded \$1,000.00) over a period of time. Mr. Macklin took advantage of Local 463's offer and paid his initiation fee in instalments. By the end of March 1992, Mr. Macklin had paid his initiation fee to Local 463 and, as well, he had paid his dues. As of the hearing date, Local 463 had not remitted Mr. Macklin's initiation fee to the International Union in order that the General Secretary-Treasurer would be in a position to issue Mr. Macklin a membership card. At no time has Local 463 taken the position with Bill Bailey of Belleville Limited that Mr. Macklin should not be employed since he was not a member in good standing.

6. After entertaining representations from counsel for the respondent, the Board ruled orally at the hearing that Mr. Macklin had status to bring this application. The fact that the General Secretary-Treasurer had not issued Mr. Macklin a membership card did not lead us to conclude that he would not be employed in the bargaining unit and entitled to bring the application. The failure of Local 463 to raise the issue with Mr. Macklin's employer is consistent with the view that it had no difficulty with Mr. Macklin's status as a bargaining unit employee during the relevant period of time. This was clearly not a situation where the employer or Mr. Macklin were attempting to influence bargaining unit employment in order to detrimentally affect the Plumbers' bargaining rights. The circumstances here are not even close to those which gave rise to the *April Waterproofing* principle.

7. The Board now turns to the issue of whether the petition represents a voluntary expression of employee wishes. As of the application date, Mr. Macklin was the only person employed by the respondent relevant to this application. He has been employed by the respondent for almost 3 years. Prior to being hired by the respondent, Mr. Macklin worked in the plumbing trade for another company for approximately 10 years. While at that firm, he opposed an application for certification by the present applicant and the application was dismissed. Mr. Macklin also opposed the applicant's effort to obtain certification in early 1991 for a bargaining unit of the intervener's employees. After the Board ruled orally at a hearing in Toronto in February 1991 that the applicant would be certified, Mr. Macklin had a discussion in the hallway with Mr. Reynolds, the owner of the intervener, and the intervener's counsel. Mr. Macklin was unable to recall the conversation at that time in detail. Mr. Macklin did recall that they discussed terminating the applicant's bargaining rights in a year's time but could not recall who initiated the idea. Mr. Macklin could not recall if Mr. Reynolds offered to assist in the termination effort but thought that that was likely. In March 1992, prior to filing this application in April 1992, Mr. Macklin approached Mr. Reynolds to discuss a termination application. Mr. Macklin testified that his reason for discussing the matter



with Mr. Reynolds was that he did not want to lose his job and he did not “want to screw up what Mr. Reynolds had going”. It appears that Mr. Reynolds’ response convinced Mr. Macklin to proceed with a termination application. Mr. Macklin stated that Mr. Reynolds promised him he would not lose his job and also testified that Mr. Reynolds said he would help pay Mr. Macklin’s legal fees. Mr. Macklin then approached a lawyer who assisted him in preparing and filing this application.

8. We do not find it necessary to extensively review the Board’s jurisprudence concerning petitions. The Board simply notes that there is an onus on the applicant in a termination application to satisfy the Board on the balance of probabilities that the petition filed in support of the application represents a voluntary expression of employee wishes. In assessing the voluntariness of a petition, the Board will have regard to all of the evidence before it. It will not give any weight to a petition where someone in a management capacity has been involved in the origination or circulation of a petition. The Board recognizes that there is a difference between petitions filed in a certification context and those filed in support of a termination application. In *Ontario Hospital Association Blue Cross*, [1980] OLRB Rep. Dec. 1759, the Board stated the following at paragraph 31:

The sole issue before the Board in every case regarding a “petition” is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees’ apparent change of hearts. As the Board commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 (now 57) of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49 (now 57), a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union’s certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49 (now 57), the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 (now 57) of the Act.

9. Although the Board is less inclined to draw negative inferences in a termination application where there is no “sudden change of heart” than it would be in a certification proceeding, the Board’s task is still to “protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, in the matter of selecting or rejecting a bargaining agent” (*Peel Block Co. Ltd.*, 63 CLLC ¶16,227).

10. The issue before us is not an easy one to decide. Mr. Macklin has expressed opposition to the applicant on two previous occasions. When he filed his application, he was the only person in the bargaining unit, a situation which eliminates some of the concerns expressed in the Board’s petition jurisprudence. Nonetheless, the Board must be satisfied that the origin of the termination effort is not tainted by employer influence or interference. The discussion in the hallway at the Board’s offices after the union was certified, in which Mr. Reynolds and Mr. Macklin discussed terminating the applicant’s bargaining rights in a year’s time, is not fatal, by itself, for Mr. Mack-



lin's petition. What raises a difficulty for Mr. Macklin's petition in this case is his discussion with Mr. Reynolds in March 1992. Mr. Macklin did not simply file his termination application during the open period. Rather, he felt he needed to have a discussion with Mr. Reynolds before proceeding. One of his reasons for discussing the matter with Mr. Reynolds was that he did not want to interfere with anything Mr. Reynolds had going. One can only conclude from Mr. Macklin's evidence that if Mr. Reynolds suggested that he not proceed with an application, Mr. Macklin would not have filed this application. It looks very much like it is the intervener that determined whether this application would be made. In addition, Mr. Reynolds offered to assist Mr. Macklin with his application by contributing to his legal costs, a gesture which Mr. Macklin did not refuse. Having regard to these circumstances, the Board is satisfied that the intervener has interfered with the origination of this application and the Board is not prepared to find that Mr. Macklin's petition is a voluntary expression of employee wishes.

11. In the circumstances, the Board finds it unnecessary to decide whether Mr. Macklin was performing bargaining unit work on the application date.

12. The Board is not satisfied that not less than forty-five per cent of the employees of Bill Bailey of Belleville Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on May 1, 1992, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) [formerly 103(2)(j)] of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 58(3) [formerly 57(3)] of the Act.

13. This application is dismissed.

**DECISION OF BOARD MEMBER R.M. SLOAN; June 16, 1992**

1. With respect, I dissent from the majority decision.

2. While I share some of the concerns expressed by my colleagues with respect to the circumstances relating to the build-up to the filing of the application, I find that in the final analysis the petition is voluntary.

3. The criteria set out in a myriad of Board decisions with respect to the voluntariness of all petitions - in matters such as its origination, circulation, custody and disposition are designed to ensure that the petition is free of management influence, pressure and taint (among other matters).

4. This instant case is unique in that in addition to the absence of any "change of heart" considerations, there is only one person in the bargaining unit, which eliminates many of the concerns the Board normally deals with in respect to the voluntariness of petitions.

5. It is also clear to me that any contact between Mr. Macklin and his employer occurred after Mr. Macklin had made his decision with respect to the termination of the union's bargaining rights and had no influence whatsoever on the voluntariness of the petition.

6. In my view there can be no doubt that the opposition to union representation by Mr. Macklin is a long-standing, personal, sincerely held conviction and that the majority decision prevents him exercising his rights under the Act.

7. I find that the petition is voluntary and I would order the required vote.

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**3347-91-G** United Brotherhood of Carpenters and Joiners of America, Local Union 18, Applicant v. **C. H. Heist Ltd.**, Respondent

Collective Agreement - Construction Industry - Construction Industry Grievance - Whether union holding bargaining rights with respect to any of employer's employees - Employer conceding that it was member of Sarnia Construction Association (SCA) when 1975 collective agreement between union and SCA representing those companies defined as "members" of SCA entered into - Employer asserting, however, failure to define who were "members" of the S.C.A. - Board having no difficulty in finding that all entities which were members of the SCA, as defined in its By-law Number 1, were bound by that collective agreement and that respondent employer bound to current Provincial collective agreement

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

**APPEARANCES:** *N. L. Jesin* and *C. Calligan* for the applicant; *Robin C. Cumine* and *Andrew Crowe* for the respondent.

**DECISION OF THE BOARD;** June 24, 1992

1. This a referral to the Board, under section 126 of the *Labour Relations Act*, of a grievance in the construction industry.
2. The applicant trade union grieves that the respondent has violated the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency, and the Ontario Provincial District Council, United Brotherhood of Carpenters and Joiners of America (the "Carpenters Provincial Agreement") in that it failed to abide by the terms and conditions thereof when it constructed a building referred to as the "C. H. Heist Warehouse and Office Building" on Birmingham Street in Hamilton.
3. The respondent denies that the applicant holds bargaining rights with respect to any of its employees or that it is bound to any collective agreement with the applicant. In the alternative, the respondent asserts that the applicant has either abandoned or should be estopped from asserting any bargaining rights it had or has in that respect. In the further alternative, the respondent asserts that it has not breached the Carpenters Provincial Agreement as alleged by the applicant.
4. At the hearing on June 5, 1992, *the parties agreed* to proceed with only the first issue raised by the respondent; that is, whether the applicant holds relevant bargaining rights with respect to any of the respondent's employees, and whether the respondent is, subject to its other arguments, bound by the Carpenters Provincial Agreement.
5. The applicant asserts that it holds bargaining rights for employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario as defined by the Carpenters Provincial Agreement and that the respondent was, at all material times, bound by the Carpenters Provincial Agreement in that respect, by reason of the respondent's membership in the Sarnia Construction Association (the "S.C.A."). The applicant relies on the Board's decision in *Great Lakes Fabricating, a Division of Glascar Ltd.*, (Board File No. 2585-81-R, June 3, 1982, unreported) in that respect.
6. The respondent concedes that it was a member of the S.C.A. in 1975 when a collective agreement, styled as being between "Local Union 1256 of the United Brotherhood of Carpenters and Joiners of America, Sarnia, Ontario, and Sarnia Construction Association representing those



companies defined “members” of the Sarnia Construction Association”, was entered into. However, in what it admits is a very technical argument, the respondent submits that this key link in the applicant’s claim to bargaining rights is defective. This defect, which the respondent asserts is fatal, consists of the failure to define who were “members” of the S.C.A. and therefore fails to identify which company it is which were “members” of the S.C.A. for purposes of that collective agreement.

7. Further, the respondent argues that the *Great Lakes Fabricating, supra*, case is distinguishable on its facts and that its rationale is not applicable to this case.

8. The respondent is a wholly owned subsidiary of the similarly named C. H. Heist Corporation, an American company. It describes itself as an industrial service contractor which specializes in high pressure painting and water-vacuuming services. In Ontario, it operates out of 5 locations: Sarnia, Hamilton, Oakville, Sudbury and Sault Ste. Marie. The respondent admits to being bound to various collective agreements, including the provincial agreement between the Ontario Painters Contractors Association, the Interior Systems Contractors Association of Ontario and the Acoustical Association of Ontario (the Employer Bargaining Agency), and the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (the Employee Bargaining Agency). Although the respondent has a head office in Oakville, the respondent’s local offices operate with substantial autonomy and the local area managers are generally responsible for the respondent’s labour relations in their respective areas. The respondent applied for membership in something called the Sarnia Builders & Contractors Association on December 20, 1956. There is no evidence to indicate that that is the same thing as the S.C.A. which was incorporated by letters patent issued on June 25, 1948. However, the evidence does indicate that the respondent was a member of the S.C.A. by 1967 and remained a member until 1991. The respondent renewed its membership in the S.C.A. for each year during that period by filing an application form, and paying the requisite membership fee. For every year from 1970 on, the respondent indicated that it wished to be a “member” rather than an “associate member”. Since 1948, these terms have been defined in the S.C.A.’s By-law Number 1 as follows:

A “MEMBER” organization shall be bound by all the terms and conditions of all labour agreements entered into and signed in the name and title of the SARNIA CONSTRUCTION ASSOCIATION.

An “ASSOCIATE MEMBER” organization shall have completely equal status in all the business, functions and aims of the SARNIA CONSTRUCTION ASSOCIATION, except that “ASSOCIATE MEMBERS” will be excluded from being bound by any labour agreement entered into and signed by the SARNIA CONSTRUCTION ASSOCIATION.

9. Except for the word “organization” after the words “ASSOCIATE MEMBER”, this passage was set out in every application for membership completed by the respondent from 1969 to 1974. In making the application for membership, the respondent specifically stated its willingness to be governed by the “laws and rules” of the S.C.A. In addition, the respondent checked off the heading under which it wished to be listed in the Trade Directory published by the S.C.A. The respondent has in fact been listed in the S.C.A.’s Membership List and Trade Directory for every year during which it was a member up to and including the one issued for 1991-92.

10. John Dempsey was employed by the respondent in a management capacity (including as the Sarnia area manager) from 1972 to 1987. While he was employed by the respondent, he was on the S.C.A.’s Board of Directors and also on the S.C.A.’s Labour Relations Council. The latter is comprised of representatives of members of the S.C.A. It co-ordinates and regulates collective bargaining with various construction trade unions, including the United Brotherhood of Carpen-



ters and Joiners of America. Since the advent of provincial bargaining in the industrial, commercial and institutional sector of the construction industry, the S.C.A. has been a voting member of the Labour Bureau of the Ontario General Contractors Association (a component of the Employer Bargaining Agency) with respect to several of the civil trades, including carpentry. The Labour Relations Council has, on behalf of the S.C.A. participated in this provincial bargaining scheme and has also negotiated separately signed local schedules to provincial collective agreements.

11. The parties also made reference to proceedings before the Board in Board File No. 1321-90-G (an earlier section 126 proceeding between Local 1256 of the United Brotherhood of Carpenters and Joiners of America, a sister local of the applicant, and the respondent herein and the United Brotherhood of Painters and Allied Trades) and Board File No. 2323-90-JD (a jurisdictional dispute complaint filed by the respondent herein naming Local 1256 of the United Brotherhood of Carpenters and Joiners of America, and the Ontario Council of the International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local Union 1509 as respondents). In this case, the applicant seeks to refer and rely upon an admission by the respondent in the brief it filed in its jurisdictional dispute complaint in Board File No. 2323-90-JD that it "... is, and at all material times was, bound by a Provincial Collective Agreement with the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America and Local 1256 of the United Brotherhood of Carpenters and Joiners of America." Both of those previous matters were withdrawn with leave of the Board on the basis of a Memorandum of Settlement dated August 27, 1991 between the parties to those previous proceedings. The respondent objects to the Board receiving or relying on the aforesaid admission, arguing that it would be inappropriate for the Board to go behind the agreement of the parties in that manner.

12. The Memorandum of Settlement in question reads as follows:

O. L. R. B. File No.  
2323-90-JD

Between:

C. H. Heist Ltd.

Complainant

and

United Brotherhood of Carpenters and Joiners of America (Local 1256) and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Painters Council) and the International Brotherhood of Painters and Allied Trades, Local Union 1590 (Painters, Local 1590)

Respondents

#### Memorandum of Settlement

The Parties agree to resolve this matter on the following basis:

- 1) No party shall rely on the assignment of the work in dispute in this case for any future assignment or in any future case.
- 2) In any future assignment of the work in dispute, the Complainant shall consider the claim of the Respondent Carpenters Local 1256 in making its decision as to which trade shall perform the work.
- 3) This Complaint, as well as the grievance in O.L.R.B. File No. 1321-90-G are hereby

withdrawn without prejudice to the position of any party as to the propriety of this assignment.

Dated at Toronto this 27th day of August, 1991.

13. In response to the grievance filed in Board No. 1321-90-G, the respondent denied that it was bound to the Carpenters Provincial Agreement. However, in its own complaint in Board File 2323-90-JD, made subsequent to that denial, it specifically conceded that it was so bound. The Memorandum of Settlement deals with the assignment of work in the context of the two proceedings to which it relates. In the Board's view, looking to the brief of the respondent (the complainant in the jurisdictional dispute proceeding and the assignor of the work in dispute) in the manner requested by the applicant herein does not amount to looking behind the agreement reached by the parties in the Memorandum of Settlement. At the hearing, the Board therefore (orally) overruled the respondent's objection, although without prejudice to its right to present whatever arguments it wished with respect to what weight, if any, the Board should give this evidence.

14. There is also some evidence before the Board with respect to a jurisdictional dispute between Local 1256 of the United Brotherhood of Carpenters and Joiners of America and Local 1509 of the International Brotherhood of Painters and Allied Trades in 1976 regarding the building and dismantling of scaffolding on a job site in the Sarnia area. In the course of an attempt to resolve this dispute, the S.C.A. recommended that the work be assigned to members of the Carpenters Local. The respondent declined and instead assigned the work to members of the Painters Local. There is nothing in the evidence before the Board which indicates the basis for that decision. More specifically, there is nothing in the evidence which suggests that part of the basis for the respondent's decision was that it believed it was not bound to an applicable collective agreement with the Carpenters Local, or even that the respondent took that position at the time.

15. In *Great Lakes Fabricating, supra*, it was asserted that the respondent employer, a Sarnia area contractor and "member" of the S.C.A., was not bound to a collective agreement merely because it was a member of the S.C.A. After referring to the definition of member and associate member in S.C.A. By-Law Number 1 (which definitions are identical to those set out in paragraph 8 above), the Board ruled as follows:

4. ...

There is no question that the respondent in the present case is a member within the meaning of 1(a) of the by-law and further that in an annual publication of the Sarnia Construction Association which is a Membership and Trade Directory, the respondent has for many years now been listed and designated as a full member rather than an associate member in that directory.

5. The evidence is also clear that for a number of years the Sarnia Construction Association has bargained on behalf of its members with the various trade unions loosely referred to as the "civil trades" which include the carpenters, operating engineers, labourers, teamsters, cement finishers and bricklayers. This pattern existed prior to the advent of province-wide bargaining in the construction industry, although, for some time prior to that the bricklayers had been bargaining provincially and the Sarnia Construction Association had ceased to bargain for bricklayers.

6. The position taken by the applicant is that there is no collective agreement between the respondent and the intervener because there is neither a certificate creating bargaining rights, nor an individual collective agreement, nor a list of contractors transferred by the Sarnia Construction Association to the union. While it is clear on the facts that there is no individual collective agreement between the intervener and the respondent, and it is not disputed that there is no certificate, the evidence is clear that the respondent was bound by the bargaining of the Sarnia Construction Association prior to the commencement of province-wide bargaining in 1978.

7. In this regard, the by-law setting out the position of membership in the Sarnia Construction

Association could not be clearer. Since 1961, the respondent had been bound by that by-law and indeed listed as a member of that organization. There can be no doubt that from the period from 1961 through 1978, the Sarnia Construction Association was very specifically bargaining upon the behalf of the respondent amongst others.

8. Although there is no doubt that the respondent has observed the collective agreement with the intervener, *this is not a case*, as suggested by the applicant, *where it is alleged that bargaining rights are created by the mere observance of a collective agreement*. Rather we are satisfied that section [52] subsections (1) and (2) have from 1961 on, been complied with in such a manner as to make the agreement binding on the respondent. Section [52](1) and (2) read as follows:

“(1) A collective agreement between an employers’ organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers’ organization and each person who was a member of the employers’ organization at the time the agreement was entered into and on whose behalf the employers’ organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers’ organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.”

“(2) When an employers’ organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers’ organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers’ organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers’ organization and the trade union or council of trade unions.”

In the present case, not only is the annual booklet produced by the Sarnia Construction Association, a list of employers sufficient to comply with subsection (2) referred to above, but there is no evidence that the respondent has at any time claimed not to be bound by the agreement and notified the intervener of such a refusal to be bound. Therefore, it is clear that the respondent is bound by a collective agreement with the intervener. We therefore find that the intervener has status to intervene in these proceedings.

9. On the foregoing facts, we have found that the respondent is party to the collective agreements made by the Sarnia Construction Association prior to 1978. Since that time, of course, the respondent has been bound to the appropriate provincial agreements...

[emphasis added]

16. In our view, there is no merit to the respondent’s technical argument. The S.C.A. has been in operation for over 40 years. It has long been active in collective bargaining in the construction industry and ascertaining who is a member of the S.C.A. is a simple and straightforward matter. We have no difficulty in finding that all entities which were members of the S.C.A., as defined in By-law Number 1 as aforesaid, were bound by that collective agreement.

17. It is clear that the respondent was for many years, and was at all material times, a member of the S.C.A. The evidence does not support a suggestion that an employer could be a member of the S.C.A. for some purposes and not for others. An employer is either a member or it is not. The listings in the S.C.A. Trade Directory provide information with respect to areas in which members are active but do not operate to restrict the collective agreements to which they are bound. Furthermore, there is no evidence that the respondent ever denied either being bound by



the collective agreement between the S.C.A. and Local union 1256 of the United Brotherhood of Carpenters and Joiners of America or by the subsequent Carpenters Provincial Agreement until it took that position in October, 1990 in Board File No. 1321-90-G, and which position it subsequently abandoned in the jurisdictional complaint it filed in Board File No. 2323-90-JD.

18. Although this case is distinguishable from the one in *Great Lakes Fabricating, supra*, on the facts, the *Great Lakes Fabricating* analysis is not fact specific. We agree with the *Great Lakes Fabricating* analysis and find it equally applicable to this case.

19. The respondent was a member of the S.C.A. in 1975 when the S.C.A. became bound to the collective agreement with Local Union 1256 of the United Brotherhood of Carpenters and Joiners of America as aforesaid. This collective agreement applied to all sectors of the construction industry. Subsequently, by virtue of the amendments to the *Labour Relations Act* which established the province-wide collective bargaining scheme presently in effect for the industrial, commercial and institutional sector of the construction industry in Ontario, this resulted in all members of the S.C.A., including the respondent, and all affiliated bargaining agents of the Employee Bargaining Agency, including Local 1256 and the applicant, becoming bound by the provincial collective agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America; that is, the Carpenters Provincial Agreement.

20. In short we are satisfied that, both on the evidence and by its own admission, the respondent was, subject to the other arguments it has raised, bound to the provincial collective agreement between the Carpenters Employer Bargaining Agency, and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America at the times material to the grievance herein.

21. The Registrar is directed to relist this matter for hearing. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters remaining in dispute between them herein.

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**2256-91-R** Stephen Stacey and Frank King, Applicants v. The Canadian Paperworkers Union and its Local 934, Respondents v. **Domtar Inc.**, Intervener

**Petition - Termination - Local union officials circulating petition in support of termination application - Although many signatures on petition obtained on company premises during working hours, circumstances not such that employees would reasonably perceive that petition supported by management or that names of employees who declined to sign would become known to management - Collective agreement indicating that it was entered between employer and national union and its local - Board determining that petition naming only national union not defective - Board satisfied that petition voluntary and directing representation vote**

**BEFORE:** Robert D. Howe, Vice-Chair, and Board Members W. H. Wightman and R. R. Montague.

**APPEARANCES:** C. J. Abbass, Stephen Stacey and Frank King for the applicants; Doug Wray and

*Andre R. Foucault* for the respondents; *Elizabeth Hosie*, *Bill Lukewich*, and *Don Leslie* for the intervener.

**DECISION OF ROBERT D. HOWE, VICE-CHAIR AND BOARD MEMBER W. H. WIGHTMAN; June 24, 1992**

1. The style of cause of this application is amended to read as follows: "Stephen Stacey and Frank King, Applicants v. The Canadian Paperworkers Union and its Local 934, Respondents v. Domtar Inc., Intervener."

2. This is an application under section 58(2) [formerly section 57(2)] of the *Labour Relations Act* for a declaration that the employees in the bargaining unit described below are no longer represented by their current bargaining agent.

3. It is common ground among the parties that this application is timely, and that it pertains to the following bargaining unit, as described in Article 1.01 of the applicable collective agreement:

all employees of the Company in its Plant situated at St. Marys, Ontario, save and except Foremen, and those above the rank of Foreman, Office Personnel, Sales Staff, watchmen and guards, and employees engaged in confidential capacity relating to labour relations.

4. The intervener (also referred to in this decision as the "Company" and "Domtar") produces corrugated boxes at its St. Marys plant. It is common ground among the parties that on the date on which this application was filed with the Board, there were 120 employees in the bargaining unit for purposes of the count.

5. The preamble to the aforementioned collective agreement indicates that it was entered into between:

DOMTAR INC. a Corporation, incorporated (by continuance) under the Laws of Canada and having its Head Office located at 395 de Maisonneuve Blvd., West, Montreal, Quebec, herein acting with respect only to its Domtar Packaging Plant (Corrugated Containers Division) located at St. Marys, Ontario, hereinafter referred to as the "Company".

and

CANADIAN PAPERWORKERS' UNION and its Local 934 hereinafter referred to as the "Union".

The recognition clause contained in Article 1 of the collective agreement indicates that the Company recognizes "the Union" as the exclusive bargaining agent of the employees in the bargaining unit.

6. The memorandum of agreement that gave rise to that collective agreement, and to various other collective agreements pertaining to other Company plants, was entered into between:

Domtar Inc., Domtar Packaging (Corrugated Containers Division)

and

Canadian Paperworkers Union

and its Locals

309 Keele St.  
595 Etobicoke  
934 St. Marys  
1196 Kitchener  
1597 Peterborough  
486 Duberger  
205 Molson St.  
830 Winnipeg

That memorandum of agreement was signed by two Officers and Representatives of the Canadian Paperworkers Union (also referred to in this decision as the “CPU” and the “National”, for ease of exposition). It was also signed by officers of the various locals, including Stephen Stacey, who was Local 934’s Recording Secretary when that memorandum was signed, and Steve Wright, who was the President of Local 934 (also referred to in this decision as “the Local”) at that time. Bargaining with the Company on “main agenda” items was conducted by National representatives and representatives of the CPU locals on a centralized basis, with “local issues” being bargained with Company representatives (including a Head Office representative) at each plant by the executive officers of the local pertaining to that plant and a CPU National Representative. Local negotiations generally commenced about two months prior to main agenda negotiations. Any local issues which remain unresolved were transferred over to the main agenda negotiations.

7. During the two and a half days that were devoted to hearing evidence and argument regarding this application, the Board heard testimony from the following three persons: the applicant Stephen Stacey, who at all material times was the President of Local 934; the applicant Frank King, who at all material times was the Local’s Recording Secretary; and Bill Conley, a Local 934 steward who was also called as a witness by applicants’ counsel. (Those three persons and all others holding office in the Local lost their positions when the Local was placed under trusteeship by the National following the commencement of these proceedings.) The respondents and the intervenor did not call any witnesses. In making the findings and reaching the conclusions contained in this decision, we have considered all of that oral evidence (with due consideration of the usual factors germane to the assessment of credibility), the documentary evidence that has been placed before us, and the submissions of counsel. We have also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

8. The possibility of leaving the CPU was first discussed by members of the bargaining unit at a Local 934 meeting in February of 1991. At that meeting a motion was made that the Local hire a business representative, because it was felt that the Local was not getting enough assistance from the National. Concerns were also expressed about other matters, including what Mr. Stacey described as “political games being played at the top”. The idea of leaving the CPU came up during the discussion of that motion. The motion was defeated at that meeting but another motion to the same effect was passed at a subsequent meeting (in March or April of 1991), as a result of which the Local hired as a consultant Gary Bucella (who, prior to being terminated by the National in the Fall of 1990, had been a CPU National Representative whose duties included servicing Local 934). Employee dissatisfaction with the CPU was also raised by some of the bargain-



ing unit employees in discussions which took place following meetings of the Local in the Spring of 1991.

9. No CPU National Representative attended the "local issues" bargaining session that was held in August of 1991 in respect of the St. Marys plant. The only persons in attendance other than Company representatives were members of the Local 934 Executive and Mr. Bucella.

10. The idea of leaving the CPU resurfaced in September of 1991. At the regular meeting of the Local on September 7, 1991, Mr. Stacey reported to the membership that when the negotiation committee met with management to discuss local issues in August, "no one from the CPU bothered to show up that day". The members were extremely upset by that information and decided to discuss the matter further after the Local 934 meeting was adjourned. Accordingly, following the adjournment of that meeting, the forty to fifty people in attendance had a discussion about getting out of the CPU and looking elsewhere for another union. Mr. King and other members of the Local 934 Executive were aware from discussions with executive members from other locals that employees at other Domtar plants were also thinking about leaving the CPU. This information was passed on to the membership during the course of the discussion which followed the adjournment of the September 7 meeting. During that discussion it was agreed that Mr. Stacey and another person (whose name was not disclosed in the evidence) would check out the employees' options by looking into other unions, and that they would get back to the membership at the next meeting of the Local. Mr. Bucella was also asked to look around "to see if there was anything out there". No decision was made on September 7 about whether or not to leave the CPU as Mr. Stacey and others involved in the matter felt that they "still had lots of time" because a company other than Domtar had been chosen as the CPU's target company, negotiations with that target company had not yet begun, and all that had occurred in respect of the Domtar negotiations was "the exchanging of main agendas".

11. The evidence also indicates that the outcome of the election of National officers that was to be held at the CPU convention which was to commence on September 16 was likely to have a bearing on whether employees in the bargaining unit would want to change unions or remain with the CPU. If there was a change in leadership, employees might wish to remain with the CPU, but if the incumbents were re-elected the employees would likely want to get out of the CPU.

12. On Friday, September 13, 1991, Don Snow, the President of CPU Local 309 (at the Company's Keele Street Plant) telephoned David Forrester, who at that time was the Vice-President of Local 934, to tell him that the National had applied for conciliation. Mr. Snow further indicated that if they wanted to keep their options open they only had until 5:00 p.m. on Tuesday, September 17 to get a decertification petition signed and presented to the "Labour Building". Mr. Snow also gave Mr. Forrester the wording of the petition and advised him that employees at other Domtar plants were taking similar steps. Mr. Forrester passed all of that information on to Mr. King, who took the wording home and used it to type the petition that was subsequently filed with the Board. The heading on the petition, which was typed by Mr. King on the letterhead of Local 934 and addressed to "Labour Building, 400 University Avenue, Toronto, Ontario", reads as follows:

We the undersigned no longer desire or wish to be represented by the Canadian Paperworkers Union as our bargaining agent with our company Domtar Packaging Inc.

13. There are eighty-one signatures on the front of the petition, and twenty-six more on the reverse, which does not contain a heading (or any other wording except those twenty-six signatures and the words "President Local 934" which appear after Mr. Stacey's signature). Thus, the petition contains a total of 107 signatures, 101 of which coincide with names on the list of employees filed

by the intervener. (As indicated above, on the basis of that list it is common ground among the parties that there were 120 employees in the bargaining unit on the date of this application for purposes of the count.)

14. At the time he typed the petition, Mr. King understood the CPU to be the employees' bargaining agent and understood the wording of the petition to be indicating that the employees "want to get out of the CPU". He drew no distinction between the CPU and Local 934 because he thought they were one and the same. He was also of the view that if they got out of the CPU, the employees would find another union to represent them. He viewed the purpose of the petition to be keeping the employees' options open, with one of those options being that of remaining with the CPU if the employees wanted to do so. He did not type the petition on Local 934 letterhead for any particular reason, such as to indicate that Local 934 was supporting the petition; he merely used it because it was the only unused paper which he had on hand at the time he typed the petition.

15. Mr. King brought the petition with him to the plant when he reported for work on Sunday, September 15, 1991 for the midnight shift which runs from 11:00 p.m. to 7:00 a.m. During the course of that shift he obtained 27 signatures on the petition by bringing it to the employees at their machines during working hours and explaining to them that the purpose of the petition was to keep their options open. All of the employees working on that shift signed the petition. Some of the signatures were obtained as Mr. King moved around the plant performing some of his duties as a flexo bundler, which include speaking with other employees to obtain instructions about customers' orders and walking through the plant to obtain various sheets and side panels. Others were obtained during periods in which he had temporarily completed all of his duties and was waiting for other employees to finish the work necessary to begin a new run. It is clear from the evidence that it was not unusual for Mr. King to be away from his machine several times during the course of a shift. The only member of management who was present during that shift was Carl Schmidt, who was the foreman on that shift. His desk is located thirty or forty feet away from the machine on which Mr. King is the bundler. Mr. Schmidt does not remain at his desk throughout the shift; he also moves around the plant, which occupies approximately 180,000 square feet. Although Mr. King was not particularly concerned about keeping Mr. Schmidt unaware of the petition, he did not discuss it with him. Moreover, we accept his evidence that neither Mr. Schmidt nor any other member of management was present when Mr. King obtained any of those signatures.

16. When Mr. King was not obtaining signatures on the petition he kept it in his back pocket. He put the petition in his locker around 6:30 a.m. (on September 16) and gave it to Mr. Conley about twenty-five minutes later. When he handed Mr. Conley the petition, Mr. King told him that the National had applied for conciliation and that in order to keep their options open to change unions they had to have a petition signed and brought to the Labour Board in Toronto by Tuesday. He asked Mr. Conley to take the petition around to the employees on his shift and then to give it to Mr. Stacey at the end of the shift. This conversation took place in front of their lockers as Mr. King's shift was ending and Mr. Conley's shift was about to begin. Mr. King selected him to circulate the petition on the day shift because he was the shop steward and no one on the Local Executive was working on that shift.

17. During the course of his eight-hour shift, Mr. Conley, who is also a flexo bundler, obtained over forty additional signatures on the petition. Some of the employees heard about the petition and approached Mr. Conley in order to sign it. Others signed when they came to his work station to resolve work-related problems. However, most of those signatures were obtained by Mr. Conley going over to the employees in their work areas during times when his presence was not required at his own machine, during his breaks, and during times when the duties of his position



required him to leave his machine and go to other places in the plant. Mr. Conley told the employees that the National had filed for conciliation and that the only way to keep their options open was to submit a petition to the Labour Board. In response to questions, he also told some of the employees that one of the options was to stay with the CPU, depending upon who was elected at the convention. No member of management was present when any of those signatures were obtained. Only one of the employees whom Mr. Conley approached about signing the petition declined to do so.

18. As requested by Mr. King, Mr. Conley gave the petition to Mr. Stacey when he arrived for work shortly after 3:00 p.m. on September 16. Mr. Stacey had not had very much contact with members of the Local Executive or other employees during the preceding week because he was on the midnight shift and had been absent for several nights due to his son's hospitalization in London as a result of a serious accident. However, he was informed by Mr. Forrester of the National's conciliation application and the decertification petition when Mr. Forrester telephoned him late at night on Saturday September 14 or Sunday September 15 from Vancouver, where Mr. Forrester and Dan Richardson (the Treasurer of Local 934) had gone to attend the CPU convention. (Mr. Stacey had planned to attend the convention but was unable to do so because of his son's accident.) Mr. Forrester told Mr. Stacey that it was the President of the Keele Street CPU Local who had advised him of the National's application for conciliation. Mr. Forrester also explained that if they did not get the petition to the Labour Board by 5:00 p.m. on Tuesday, September 17 so as to obtain "a vote amongst all of the employees to see if they really truly wanted to leave the CPU", they would be locked in for the term of the next collective agreement. He told Mr. Stacey that Mr. King would circulate the petition on the midnight shift and then give it to the steward on the day shift, who after collecting signatures on that shift would give the petition to Mr. Stacey, so that he could "look after the 3:00 - 11:00 p.m. shift". Mr. Forrester also indicated that a number of other CPU locals were going to be doing the same thing.

19. After receiving the petition from Mr. Conley, Mr. Stacey obtained a further 38 signatures on it during the course of his shift. The first ten of those signatures were obtained around 3:45 p.m. while the corrugator of which Mr. Stacey is an operator was being repaired by maintenance workers after breaking down. He obtained another signature around 4:45 p.m. when an employee who had heard about what was going on approached him at the corrugator and asked him to sign the petition. The next nine signatures were obtained in the cafeteria just after 5:00 p.m. during supper break. Before they signed their names on the back of the petition, those nine employees were told by Mr. Conley that it was a petition to decertify the CPU, which had applied for conciliation "behind [their] backs" and thereby placed them "under severe time limits". He explained that the petition had to be presented to the Board by Tuesday September 17. He also explained that "by signing the document it did not necessarily mean that [they] would be leaving the CPU; it was merely a request to have a vote about leaving the CPU." At least some of those employees read the front of the petition before signing their names on the back of it. The next six people signed at their (and Mr. Stacey's) work station shortly after 7:00 p.m. while awaiting the return of the two maintenance department employees who were working on that shift. Mr. Stacey obtained the next ten signatures by visiting employees at their work station during his break. All of them read the petition and were provided by Mr. Stacey with an explanation similar to that described above. After signing the petition himself, Mr. Stacey obtained one additional signature by going to see an employee just before the end of the shift. That employee signed the front of the petition (after asking Mr. Stacey if there was any special place to sign and being told "wherever you can find a place to put your signature"). Most of the employees whom Mr. Stacey approached already knew about the petition before he spoke to them. No member of management was present when any of the signatures witnessed by Mr. Stacey were obtained. All of the employees whom



Mr. Stacey approached concerning the petition signed it, with the exception of three employees who declined to do so.

20. Mr. Stacey returned the petition to Mr. King when the latter reported for work at 11:00 p.m. on Monday September 16. Mr. King put it in his locker and left it there until his shift ended at 7:00 a.m. on September 17. He then brought the petition to his home and, after having breakfast and visiting with his family until approximately 8:30 a.m., drove to Toronto and delivered the petition to the Board. He subsequently obtained facsimiles of a blank Form 17 application form and a completed Form 17 application form from Mr. Snow, and used the completed form as a precedent to assist him in filling out the blank form. After typing in the pertinent information on the form and having it signed by himself and Mr. Stacey, Mr. King forwarded it by courier to the Board.

21. At the commencement of the hearing of this application, respondents' counsel submitted that the application should be dismissed because the wording of the petition refers only to employees no longer wishing to be represented by "the Canadian Paperworkers Union", whereas (in his submission) the bargaining rights in question are held jointly by the CPU and its Local 934. In support of that position he referred the Board to the collective agreement's preamble, recognition clause, and union security clause, as well as to the fact that the memorandum of agreement which gave rise to that collective agreement was signed not only by National Officers and Representatives but also by local officers including two from Local 934. He also referred to section 73 of the Rules, section 58 of the Act, the case of *Patrick McKeon and Other Employees of Hiram Walker & Sons Limited*, [1973] OLRB Rep. Nov. 603, and the Board's certification jurisprudence holding that evidence of membership in the parent union is not sufficient where it is the local applying to be certified.

22. After hearing submissions from counsel for the applicants and counsel for the intervenor, and reply submissions from respondents' counsel, the Board recessed the hearing to consider that matter and then made the following oral ruling:

Having given some initial consideration to the issue raised by respondents' counsel, we are unanimously of the view that we should proceed to hear evidence on all aspects of the case, including evidence regarding what entity or entities hold the bargaining rights in question, evidence concerning the origination, circulation, and voluntariness of the petition, and evidence concerning what the somewhat ambiguous language of the petition was intended or understood to mean. (For an example of such evidence being received by the Board in a somewhat similar context, see *Patrick McKeon and Other Employees of Hiram Walker & Sons Limited*, [1973] OLRB Rep. Nov. 603, at paragraphs 5 and 9. See also *Fuller's Restaurant*, 80 CLLC ¶14,021.)

23. In final argument, Mr. Wray referred the Board back to his preliminary submissions on behalf of the respondents, and contended that the evidence adduced during the hearing provided additional support for that position. He further submitted, in the alternative, that the application should be dismissed on certain other grounds, which may be summarized as follows: (1) the evidence of where the idea and wording of the petition came from is inadequate; (2) the evidence does not establish that not less than 45 per cent of the bargaining unit employees had voluntarily signified in writing as of the pertinent time that they no longer wished to be represented by the union, as many of them were told that the purpose of the petition was merely to keep open their options, including the option of staying with the CPU, and because 26 persons signed the reverse side of the petition, which had no heading on it; (3) the employees' reasonable perception would be that the petition, which was circulated during working hours, was tacitly supported by management and that the names of those refusing to sign the petition would become known to management; (4) the applicants did not meet the onus of establishing the voluntariness of the petition on the balance of probabilities; and (5) the cumulative effect of the foregoing factors is such that the Board should

not give any weight to the petition. Respondents' counsel also referred the Board to a substantial number of previous decisions during the course of his submissions.

24. In his submissions on behalf of the applicants, Mr. Abbass reviewed the evidence and submitted that the onus of establishing the voluntariness of the petition had been met. Having noted that the considerations which apply to a decertification petition differ from those applicable to a petition circulated in opposition to a certification application, he contended that the circulation of the petition on Company premises during working hours did not taint it, as there was nothing in the circumstances that would give rise to a reasonable perception on the part of employees that the petition was supported by management, or that the names of employees who declined to sign it would become known by management. He further contended that there was no need for the applicants to call other witnesses and thereby prolong the proceedings. Applicants' counsel also argued that the petition clearly evinces an intention on the part of the employees to decertify their bargaining agent, and that the Board should not permit that intention to be defeated by technicalities. It was his position that the employees who signed the back of the petition knew what was going on and were aware of what they were signing. In reply to Mr. Wray's submissions regarding employees signing the petition to keep their options open, applicants' counsel argued that it is highly unreasonable to say there is something wrong with explaining to people the two-step procedure set out in section 58(3) of the Act, which provides for a representation vote to be taken in which bargaining unit employees can vote for or against termination of their trade union's bargaining rights. He also argued that all of the witnesses, including Mr. King, had testified in a straightforward and honest manner, and that their evidence should be accepted as credible by the Board. During the course of his reply argument (which for ease of exposition in this decision has been blended together with his argument in chief and his response to Mr. Wray's preliminary submissions), applicants' counsel distinguished many of the cases cited by the respondents' counsel on the basis that they pertained to petitions in certification proceedings rather than termination petitions.

25. In her submissions on behalf of the intervener, Ms. Hosie noted that there is no evidence that management saw, encouraged, or was in any way involved with the petition. Thus, she asked the Board to render a decision reflecting that management had not affected its voluntariness. She also submitted that to adopt the position advocated by respondents' counsel in his preliminary submissions would be to permit form to triumph over substance.

26. Section 58(3) of the Act provides:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

27. Having duly considered the submissions of counsel, we have concluded, for the reasons set forth below, that although there are some factors present which in other circumstances might invalidate a petition, in the circumstances of the present case we are satisfied on the totality of the evidence that the petition has been duly proven on the balance of probabilities to be voluntary.

28. As contended by applicants' counsel, the considerations applicable to a petition circulated in support of an application for termination of bargaining rights differ to some extent from those applicable to a petition circulated in opposition to a certification application. See, for example, *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759 (request for reconsideration dismissed, [1981] OLRB Rep. March 304):



31. The sole issue before the Board in every case regarding a “petition” is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which *opposes* the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees’ apparent change of hearts. As the Board commented in *N.J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 [now section 58] of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union’s certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

See also *Kitchener Beverages Limited*, [1990] OLRB Rep. March 291, and the cases cited in that decision.

29. It is clear from the totality of the evidence that by February of 1991 at least some of the members of Local 934 had formed the idea of leaving the CPU because of various concerns, including their feeling that they were not getting enough assistance from the National. That idea resurfaced on September 7, 1991 after Mr. Stacey reported to the membership at a meeting of the Local that when the negotiation committee met with management to discuss local issues in August, “no one from the CPU bothered to show up that day”. That the forty to fifty employees in attendance at the meeting were quite dissatisfied with the CPU is evident not only from their reaction to this information but also from the fact that after the members had discussed the desirability of leaving the CPU, it was agreed that Mr. Stacey and another individual would check out the employees’ options by looking into other unions. Mr. Stacey and others involved in the matter felt that they still had lots of time (for the reasons indicated in paragraph 10 of this decision). However, the available time was substantially reduced when the National applied for conciliation during the following week. Under the provisions of section 62(2) of the Act, once a conciliation officer had been appointed in respect of the aforementioned centralized bargaining, neither the employees in the St. Marys plant bargaining unit nor the employees at the other Domtar plants (who had also been thinking of leaving the CPU) would be entitled to make an application for termination of bargaining rights until at least twelve months had elapsed from the date of the conciliation officer’s appointment (and possibly much longer). Thus, the National’s application for conciliation prompted Mr. Snow, the President of CPU Local 309 at the Company’s Keele Street plant, to inform Mr. Forrester of the conciliation application and of the steps which would have to be taken by 5:00 p.m. the following Tuesday in order for the membership to keep their options open. Mr. Forrester relayed that information to Mr. King, who typed the petition and, with the assistance of Messrs. Conley and Stacey, circulated it in the manner described above and obtained signatures from over eighty per cent of the employees in the bargaining unit. Although many of those signatures were obtained on Company premises during working hours, the circumstances were not such that employees would reasonably perceive that the petition was supported by management or that



the names of employees who declined to sign it would become known to management. Two of the circulators were flexo bandoleers whose job duties involved considerable movement around the plant. Some of the signatures were obtained during breaks, and no member of management was present when any of the signatures were obtained. Moreover, the petition was being circulated not by persons opposed to unionization, whose interests might reasonably be perceived to be allied with those of management, but by local union officials following discussions initiated by the membership as a result of widespread employee dissatisfaction with the CPU. Thus, in the rather unique circumstances of this case, the manner in which the signatures were obtained does not cast doubt upon their voluntariness, and the Board is prepared to accept and rely upon Mr. King's entirely candid and credible explanation of where he obtained the wording of the petition and the idea of circulating it.

30. We also find no merit in Mr. Wray's contention that the application should be dismissed because the wording of the petition refers only to employees no longer wishing to be represented by "the Canadian Paperworkers Union". It is clear from the evidence that this is not a case like the aforementioned *Patrick McKeon* case in which the petition was being circulated in order to get rid of the parent union but retain the local, and in which it was unclear whether the employees who signed the petition understood the nature of the document they were signing. In the instant case the petition was clearly being circulated in order to preserve the employees' option of changing bargaining agents. As noted by the Board in *Genwood Industries Limited*, [1976] OLRB Rep. Aug. 417, at paragraph 7, "[i]t is the duty of the Board to concern itself with the substance and not merely the form of documents tendered in support of an application for termination of bargaining rights." In paragraph 8 of that decision, the Board went on to state:

It is the intention of section 49 [now section 58] that it shall be the primary concern of the Board to ascertain the wishes of the employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes would be unnecessarily fettered, if we were to adopt the "forms of action" approach suggested by [counsel for the respondent]. The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act.

(See also *Duke's Hotel (1977) Inc.*, [1979] OLRB Rep. April 298.) Having regard to all of the evidence and the inferences which may reasonably be drawn from the evidence, we are satisfied that the reference in the petition's heading to "the Canadian Paperworkers Union" was intended by its circulators and understood by its signers to be a reference to the employees' current bargaining agent, which is the "Canadian Paperworkers Union and its Local 934" under the terms of the aforementioned collective agreement that was jointly negotiated and signed by the National and the Local.

31. The fact that 26 of the 107 signatures appear on the petition's reverse side which does not have a heading is also of no moment in the instant case as it is evident that even if the Board disregards all 26 of those signatures, the signatures on the front of the petition that coincide with names on the employer's list constitute well over the requisite forty-five per cent of the employees in the bargaining unit.

32. We are also unpersuaded that this application should be dismissed because some of the employees who signed the petition were told that its purpose was to keep their options open. In the context of a termination application which, under section 59 of the Act, does in fact involve a two-stage procedure of which the petition (if found to be voluntary) is but the first, we see nothing

improper about the circulator of a petition indicating to potential signatories that it is intended to give them the option of subsequently voting for or against continued representation by their bargaining agent. We are satisfied on the evidence adduced before us that this is what the circulators of the petition understood its purpose to be, and what they conveyed to the employees with whom the matter was discussed.

33. Thus, we are not persuaded that the matters raised by respondents' counsel in his able submissions, whether considered individually or cumulatively, warrant the rejection of the petition filed by the applicants. Nothing in the evidence provides any suggestion of managerial involvement in or support for the petition, which was circulated by local union officials in order to preserve the option of the bargaining unit employees to act upon their pre-existing dissatisfaction with their current bargaining agent by terminating its bargaining rights as a first step towards changing unions.

34. For the foregoing reasons, the Board is satisfied on the totality of the evidence that not less than forty-five per cent of the employees in the bargaining unit at the time the application was made, had voluntarily signified in writing that they no longer wished to be represented by their current bargaining agent on October 21, 1991, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be so represented under section 58(3) of the Act.

35. The Board directs that a representation vote be taken of the employees of the intervenor in the bargaining unit described in paragraph 3 of this decision. All those employed in the bargaining unit on the date of this decision who are so employed on the date the vote is taken will be eligible to vote.

36. Voters will be asked to indicate whether or not they wish to be represented by The Canadian Paperworkers Union and its Local 934 in their employment relations with Domtar Inc.

37. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER RENE R. MONTAGUE; June 24, 1992**

I concur with the majority in this termination application and ordering a vote, but in my opinion the only losers in this application will be the employees if they choose to vote to decertify themselves from the Canadian Paperworkers Union to join another union. If the employees choose to decertify themselves they will lose all the economic power they enjoyed while part of a master agreement with 7 other plants. The only winner will be the employer Domtar, as now they can play one plant against the other.

In the past albeit not perfect, the Canadian Paperworkers Union had some clout at the bargaining table, with the possibility and threat there that the Company could be shut down at all 8 locations. This economic power will be diminished greatly.

In the past the employees were part of the decision making that affected them but now if they vote to go to another union they may have to accept what someone else has negotiated and they will have had absolutely no say or power to do otherwise.

In closing remember "the union" is you the employees and will be no stronger than you are prepared to make it no matter what name you attach to the union be it Canadian Paperworkers Union or International Woodworkers Union.

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**0314-92-R** Shopmen's Local #834 of the International Association of Bridge, Structural and Ornamental Iron Workers, Applicant v. **E.S. Fox Limited**, Respondent v. Millwrights District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309, Intervener #1; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666, Intervener #2; International Brotherhood of Electrical Workers, Local 303, Intervener #3 and International Union of Operating Engineers, Local 793, Intervener #4

**Adjournment - Certification - Construction Industry - Parties - Practice and Procedure - Given wording of union's proposed bargaining unit description, Board declining adjournment request to give notice to Canadian Pipe Fabricators Association and to Plumbers' union - Board declining to defer certification application pending determination of two section 126 referrals of grievances to arbitration - Board denying requested adjournment and extension of terminal date because of intervener's certification application - Board ruling that its practice in dealing with intervener applications filed on or before "original" certification application's terminal date is to have that intervener application governed by "original" application's application and terminal dates**

**BEFORE:** *Susan Tacon*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. R. Montague*.

**APPEARANCES:** *Ronald Davis*, *John Sciandra* and *Brian Doherty* for the applicant; *W. J. McNaughton* and *M. Whittaker* for the respondent; *N. L. Jesin* and *Ron Coltart* for intervener #1; *Brian Scott* and *W. McRoberts* for intervener #2; *P. Roach* for intervener #3; and *Jack Slaughter* and *James Anderson* for intervener #4.

**DECISION OF THE BOARD;** June 8, 1992

1. The style of cause is hereby reflected to add as interveners to these proceedings: "Millwrights District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309 (the "Millwrights"); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (the "U.A. Local 666"); International Brotherhood of Electrical Workers, Local 303 (the "I.B.E.W."); and International Union of Operating Engineers, Local 793 (the "I.U.O.E.") as interveners to these proceedings.

2. This is an application for certification by the Shopmen's Local 834 in which there is a intervener certification application by the Millwrights. The parties met with a Board Officer; however, a number of matters remained in dispute.

3. At the hearing, the Board dealt with several issues by way of oral ruling following submissions from all parties. It is useful in the circumstances for the Board to set out those rulings herein.

4. Counsel for the respondent (joined by counsel for the U.A. Local 666) sought an adjournment of the hearing to give notice to the Canadian Pipe Fabricators Association and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. The Board ruled that the respondent (and implicitly the U.A. Local 666) cannot raise the issue of notice to those parties at this point in the proceeding given the word-



ing of the bargaining unit description sought in the original application and the fact that that issue was not raised at the meeting with the Board Officer. As to whether the U.A. and/or the Pipe Fabricators Association could subsequently raise the notice issue themselves, that was a risk which the other parties were content to bear. Further, the Board ruled that the usual exclusion given in industrial units where other trade unions held bargaining rights, that is, excluding employees in bargaining units for whom any trade union held bargaining rights as at April 28, 1992 (in the instant case), would ensure that the bargaining rights of the U.A. would not be affected by the instant application for certification.

5. The respondent also sought an adjournment of the proceedings and an extension of the terminal date because of the Millwrights' intervener application. The Board ruled that the Board's practice in dealing with intervener applications filed on or before the terminal date established with respect to an "original" application for certification is to have that intervener application governed by the application and terminal dates established for that original application. The Board heard no compelling reasons to depart from that practice in the instant case. Accordingly, the Millwrights' certification application will be determined on the basis of the application and terminal dates established in the Shopmen's Local 834 application and the terminal date will not be extended.

6. The respondent (joined by the U.A. Local 666) submitted by way of preliminary motion that the instant certification application of the Shopmen's Local 834 (and of the Millwrights) be deferred pending a determination of two section 126 [formerly section 124] referrals of grievances to arbitration (Board Files 3256-91-G and 3540-91-G). The former grievance referral involved the International Union of Operating Engineers and its Local 793 and the respondent in the instant proceedings; the latter involved the Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007 and the respondent herein. Those grievance referrals had been listed together before another panel of the Board; an interim ruling dealing with preliminary matters had issued and the referrals are to be listed for continuation. The Board herein ruled that the instant certification applications not be deferred until the section 126 grievance referrals were determined and/or were not to be listed together with the section 126 grievance referrals. The Board was not persuaded, given the context of the grievance referrals, the issues to be determined therein and the parties to those proceedings, that the instant certification application should be delayed. In this regard, the Board noted for the record and information only the stipulation by counsel for the Shopmen's Local 834 that "should the Millwrights and/or the Operating Engineers be successful in their grievances in establishing bargaining rights, the applicant would be bound by the determinations of the Board in those grievance referral proceedings".

7. The Board then turned to the bargaining unit description. With respect to the application by the Shopmen's Local 834, there was partial agreement with respect to the bargaining unit description as follows: all employees of E.S. Fox Limited at Port Robinson, save and except foremen, persons above the rank of foreman, office and clerical staff. The parties further agreed on the following clarity note: "It is understood that draftspersons are excluded from the bargaining unit as office and clerical employees". On the basis of that agreed clarity note, the respondent withdrew its request to exclude "technical" staff.

8. On agreement of the parties, the Board hereby appoints a Board Officer to do a record check with respect to the list and composition of employees in the bargaining unit in order to resolve, if and to the extent possible, the challenges raised by various of the parties at the Board Officer meeting to the schedule of employees filed by the employer.

9. This matter is referred to the Registrar to be listed for continuation on September 23, 24 and 25, 1992. This panel is not seized.

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**1933-90-JD** Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Ontario Provincial District Council, Complainants v. **Ellis Don Limited** and Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598, Respondents.

**Adjournment - Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Board declining to allow respondent union to make preliminary objection where it had not been included in the union's pre-hearing brief in accordance with Practice Note #15 - Board not allowing respondent union to lead evidence with respect to area practice where union neglected to include job or project lists in its pre-hearing brief - Board allowing evidence of employer practice throughout the province (and not exclusively in Board Area 3) - Having regard to parties consenting to adjourn 12 of 13 days set by Board for hearing, Board declining to set further hearing dates unless request received within 1 month - Board indicating that there will be no consultation with the parties with respect to available dates**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

**APPEARANCES:** *L. A. Richmond* and *J. MacKinnon* for the complainants; *Joseph Liberman* and *Paul Richer* on behalf of respondent *Ellis Don*; *N. L. Jesin* and *Livio Balanzin* on behalf of respondent Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 598.

#### **DECISION OF THE BOARD;** June 30, 1992

1. This is a jurisdictional dispute complaint filed on October 24, 1990, pursuant to section 93 of the *Labour Relations Act*.

2. The work in dispute in this complaint is the chipping, grinding, parging, patching, rub-up and finishing (hand trowelling) of concrete at the University of Western Ontario Library project of *Ellis Don* in London, Ontario. Ultimately, this work was performed by members of the Labourers', Local 1059, resulting in a grievance filed by the Cement Masons, Local 598, which in turn was deferred to the filing of the instant jurisdictional complaint.

3. Consistent with the Board's Practice Note #15, Briefs were filed by the parties, and a Pre-Hearing Conference was held before a differently constituted panel of the Board, on December 16, 1992. A Memorandum was issued to the parties, following the Pre-Hearing Conference, setting out matters agreed to, those in dispute, and the positions of the parties on certain issues. A hearing was then held, on May 19, 1992, before the instant panel, the "merits" panel, to consider preliminary matters or objections raised by the parties. This decision sets out some of the rulings made orally at the hearing, together with our decisions on those matters reserved on at the hearing.

4. The Cement Masons argued that there was no dispute involving potentially overlapping work jurisdictions before the Board. It submitted that the instant complaint raised, instead, issues of overlapping representational rights or bargaining rights. More particularly, as noted in its letter to the Board of February 14, 1992, the Cement Masons took the position that the Labourers' jurisdiction over the work in dispute flowed exclusively from the Cement Finishers Appendix to the Labourers' Provincial Agreement, rather than from the labourers' designation with respect to

industrial, commercial, and institutional (“I.C.I.”) work. As counsel for Local 598 put it in his letter of February 14, 1992: “Thus, the Labourers’ claim to the work in dispute can only arise if the Labourers’ have bargaining rights for *cement finishers* (as distinct from just *labourers*) employed by Ellis Don. Because the Labourers’ do not represent cement finishers employed by Ellis Don, this complaint should be dismissed without a hearing on the merits”.

5. This argument, and the submissions in support of it, were not reflected in the Brief filed by the Cement Masons, as required by the provisions of Practice Note #15. An issue arose over whether it could be raised before the merits panel.

6. The relevant parts of Practice Note #15 read as follows:

1. The Board has adopted a pre-hearing conference procedure for jurisdictional disputes heard by the Board under section 93 of the *Labour Relations Act*. The Board will schedule a pre-hearing conference before a Vice-Chair and/or Board members. The purpose of this pre-hearing conference is to settle the dispute or, in the absence of settlement, to narrow the issues in dispute.

2. The parties are required to file complaints, replies or interventions in accordance with the Board’s Rules and this Practice Note, and, in particular in accordance with Rule 60. Rule 60 states:

60. A complainant shall file together with his complaint, and every person served with a notice of application shall file together with his reply,

- (a) any union constitution;
- (b) any collective agreement;
- (c) any agreement or understanding between trade unions as to their respective jurisdictions or work assignment;
- (d) any agreement or understanding between a trade union and an employer as to work assignment;
- (e) any decision of any tribunal respecting work assignments; and
- (f) any other document, relating to the work in dispute which may be in his possession and upon which he proposes to rely in support of his claim for relief of his claim that the relief requested should not be granted, as the case may be, and a statement as to any area or trade practice relating to the work in dispute, and pictures, diagrams or drawings of the disputed work.

*IN ADDITION*, each party must, *at the same time*, file a brief which contains a concise statement of the issues in dispute, including a detailed description of the work in dispute, and the material facts upon which it intends to rely.

3. Prior to filing its complaint with the Board, the complainant must serve a copy of its complaint with the material referred to in paragraph 2, as well as a copy of this Practice Note, on each respondent and each person named by the complainant as someone who may be affected by the complaint.

4. The complainant must file its complaint and the material referred to in paragraph 2 in quadruplicate with the Board. The complaint must be accompanied by a certificate of service as set out in paragraph 7 in respect of each respondent and each person named in the complaint as someone who may be affected by the complaint. When all the material has been served and filed, a date for the pre-hearing conference will be set by the Registrar. A COMPLAINT WILL NOT BE PROCESSED BY THE BOARD UNLESS THE COMPLAINANT HAS COMPLIED WITH THE REQUIREMENTS OF PARAGRAPHS 2, 3 AND 4.



5. Prior to filing its reply with the Board, a person served with the complaint must serve a copy of its reply and the material referred to in paragraph 2 on each of the other parties.

6. A reply and the material referred to in paragraph 2 must be filed in quadruplicate with the Board. The reply must be accompanied by a certificate of service as set out in paragraph 7 in respect of each other party. All respondents and others served with notice of the complaint must file their replies and other material referred to in paragraph 2 with the Board no later than twenty-one (21) days from the date service of the complaint was effected on them by the complainant. If the twenty-first day falls on a day on which the Board's offices are not open to the public, the reply with accompanying material must be filed no later than the next business day of the Board.

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8. EXCEPT WITH LEAVE OF THE BOARD, PARTIES WILL NOT BE PERMITTED TO ADDUCE EVIDENCE AT THE HEARING OF ANY MATERIAL FACT NOT DISCLOSED IN THE MATERIAL FILED WITH THE BOARD PURSUANT TO THIS PRACTICE NOTE.

9. If a hearing is to be scheduled following the pre-hearing conference, the Vice-Chair and/or the Board members conducting the conference shall forward to the Registrar for distribution to the parties, a memorandum of all agreements reached by the parties. The Vice-Chair and/or the Board members conducting the conference will not be members of the panel hearing the complaint on its merits.

7. Counsel for Local 598 conceded that the preliminary objection set out in paragraph 4 above had not been included in Local 598's Brief but submitted that it had been raised in subsequent correspondence and in any event, the essential facts upon which it was based had been set out in its Brief. Further, Local 598 noted that its preliminary objection had been raised during the Pre-Hearing Conference itself, although the Memorandum had not noted this. In counsel's submission, Local 598 was not raising a new matter, but only elevating its argument to the next logical step.

8. The Board accepted, for purposes of its ruling, that Local 598 had raised this issue during the Pre-Hearing Conference. Nevertheless, the issue had not been identified in its Brief, as it should have, in accordance with Practice Note #15. In paragraph 2 of the Practice Note parties are directed to file Briefs that identify the issues and the material facts, amongst other matters. What was raised in the Brief, at paragraph 14, was the position of Local 598 that the area practice evidence ought to be restricted to those employers who had or have either a collective bargaining relationship with Local 598, or with Labourers' Local 1059 insofar as Local 1059 represented construction labourers. In its Brief, Local 598 argued that evidence should not be allowed of the practice of employers who bargained with the Labourers' with respect to cement finishers.

9. That is a different matter from arguing, as it now does, that the issue before the Board is not a jurisdictional work dispute, but one of overlapping bargaining rights, and accordingly the complaint ought to be dismissed without a hearing. Since Local 598 had not properly raised this issue in its Brief, and given the nature of the argument, the Board ruled that it would not decide the issue as a preliminary objection, without prejudice to the right of Local 598 to raise this argument in final submissions. Parties raising preliminary objections in jurisdictional complaints must identify them in their briefs, or at least prior to the Pre-Hearing Conference.

10. The Board next dealt with the issue of area practice. The parties agreed that evidence of the practice of other employers ought to be restricted to practice in Board Area 3. But they disagreed on whether the evidence should be limited to I.C.I. projects or whether it should include the practice in all sectors. The Labourers' and the employer also submitted that Local 598 should

not be allowed to lead any evidence of area practice, as it had not set out material facts of area practice in its Brief.

11. First, the Board dealt with whether area practice in Board Area 3 should include all sectors. The work in dispute was performed in the I.C.I. sector. The Labourers' argued that the work in dispute was generic work, and was performed essentially the same across all sectors. There was nothing, in its submission, that made I.C.I. concrete work, of the nature here, any different than non-I.C.I. concrete work. Contractors competed with each other with respect to this type of work, regardless of whether the work arose in the I.C.I. or other sectors. Focusing solely on practice in the I.C.I. sector would not, in the Labourers' submission, tell the Board the entire story of how the industry had developed with respect to work similar to the work in dispute.

12. The Board orally ruled that evidence with respect to area practice would encompass only work within the I.C.I. sector. The dispute in question arose in the I.C.I. sector, and it is only projects within that sector that can assist the Board in determining the correct assignment. The fact that the work in question was described as generic, similar across all sectors, does not cause the Board to expand the hearing to include evidence arising in other sectors. This would significantly increase the time and expense of the hearing, to little practical effect, as it is the practice in the sector in question that is of assistance to the Board. See, for example, in this respect: *Adam Clark Company Limited*, [1992] OLRB Rep. Jan. 6.

13. Second, the Board reserved on the question of whether Local 598 would be given leave by the Board to lead evidence of area practice. We now provide our decision.

14. Practice Note #15 states clearly, in paragraph 2, that each party must file a Brief which contains a "concise statement of the issues in dispute, including a detailed description of the work in dispute, and *the material facts upon which it intends to rely*". In paragraph 8 of the Practice Note, the parties are put on notice that "EXCEPT WITH LEAVE OF THE BOARD, PARTIES WILL NOT BE PERMITTED TO ADDUCE EVIDENCE AT THE HEARING OF ANY MATERIAL FACT NOT DISCLOSED IN THE MATERIAL FILED WITH THE BOARD PURSUANT TO THIS PRACTICE NOTE".

15. Labourers' 1059 is the complainant, and as such, it first served its Brief upon the other parties, who then each had approximately twenty-one (21) days in which to file their replies. In its Brief, the Local 1059 identified the particular projects, locations, and dates upon which it intended to rely for its evidence of area practice. Local 598 was served with this Brief before it compiled its own. It was aware of both the requirements of the Practice Note, and the detail of the job lists filed by the complainant union. Nevertheless, the Brief filed by Local 598 did not set out a job list or list of projects upon which it claimed it would rely with respect to area practice. Instead, the Brief only provided a list of ten employers "in Board Area 3 who have traditionally assigned work similar to the work in dispute exclusively to Local 598". No projects were identified, nor locations or dates.

16. At the Pre-Hearing Conference, on December 16, 1991, the Labourers' indicated it would be objecting to the right of Local 598 to call evidence of area practice, having regard to its Brief and the lack of material facts. The Labourers now make that argument before us, that job or project lists constitute "material facts" within the meaning of the Practice Note, and that failure to plead them in the Brief means Local 598 cannot now provide them or lead evidence of them. The Labourers' argue that merely naming employers, with no identifying aspects such as location or dates of projects, does not sufficiently disclose the material facts. Local 598 has still not filed any job or project lists.

17. Further facts were agreed among the parties, for purposes of dealing with this prelimi-



nary objection. On this basis, it was agreed that Local 598 had not been the local union with bargaining rights for cement masons in Board Area 3 until approximately September, 1988. At that time, the current business agent took over operations of the local that held bargaining rights. Until that point, no one in Local 598 would have had knowledge of the practice in Board Area 3, nor would anyone in Local 598 have known what contractors in Board Area 3 were bound to agreements with Local 598.

18. Based on the above facts, Local 598 argued that it had pleaded all material facts, and had met the obligation set out in Practice Note #15. Alternatively, if the Board decided that job or project lists constituted material facts and ought to have been identified in the Brief, the Board ought nevertheless to exercise its discretion and grant leave to Local 598 to lead such evidence. Local 598 based this submission on two grounds, the inability of Local 598 to have provided the information, and the practice of the Board in granting leave to lead such evidence. Local 598 argued that it could not afford the funds to acquire and maintain such information and it did not, at the relevant time, have any mechanism in place to obtain and maintain records of the area practice. Local 598 submitted that it was not in a position to provide that information. Local 598 anticipated summoning employers to the hearing to give evidence with respect to their practice, and to provide the information in this manner. With respect to the Board's practice in requiring job lists as part of the Briefs (if a party intends to lead evidence of past practice), and refusing leave to lead evidence if job lists had not been provided, Local 598 argued that the Board had been inconsistent in its approach to this issue. It would be unfair, in Local 598's view, to only now adopt a rigid position, and to do so would cause extreme prejudice to Local 598. Local 598 submitted that prior decisions of the Board supported its position that the Board had not previously required job lists.

19. In the Board's view, Practice Note #15 is clear. Parties are required to file Briefs which contain all "the material facts upon which [they intend] to rely". The Practice Note also clearly indicates that failure to file material facts will mean that parties will not be allowed to lead evidence of those material facts, except with leave of the Board. In *Spruce Falls Power and Paper Company Limited*, [1989] OLRB Rep. June 645, the Board had to deal with a similar deficiency in the pleaded material facts. The Board ruled that leave would not be granted to the complainant to lead evidence of material facts not disclosed in its materials. The Board stated:

...

6. The Board's rules and practice concerning jurisdictional dispute complaints, particularly Rule 60 and Practice Note #15, are designed to assist the parties in the resolution and the adjudication of jurisdictional disputes. Once the complaint and any replies are filed, the Board schedules a pre-hearing conference in order to assist the parties in settling the dispute or to narrow the issues in dispute. If it is necessary to have a hearing, which is often the case, compliance with the Rules, the Practice Note and the work of the pre-hearing conference should result in more productive and shorter hearings than would otherwise be the case. In order for the procedure to produce the intended results, it is crucial for the parties to comply with the requirement to file what is required to be filed by Rule 60 and the Practice Note in a timely fashion. In this matter, each party was obliged to file any documents it intended to rely on and the statement of the area practice it asserts is relevant with its complaint or reply, as the case may be. At the pre-hearing conference, each party and the Board should be aware of the issues in dispute, and the material facts and the documents upon which each party intends to rely. The extent to which this does not occur will result in the failure to meet the objectives the procedure is intended to achieve.

7. Prior to the amended Practice Note, it was not uncommon for parties to fail to meet the filing requirements of Rule 60 and the previous Practice Note (see, for example *Marine-Hamlyn Joint Venture*, [1988] OLRB Rep. Feb. 158). The revision of Practice Note #15, which adopts procedures similar to those contained in the Practice Notes on first collective agreement arbitration, should indicate to the community that the Board is serious in its efforts to adopt and follow procedures which will assist in the resolution and adjudication of jurisdictional disputes.



8. Paragraph 8 of Practice Note #15 provides that parties will not be permitted to adduce evidence at the hearing of any material fact not disclosed in the material filed with the Board, except with leave of the Board. The wording of the paragraph indicates that a party who fails to comply with the Rules and the Practice Note will not be permitted to introduce certain evidence unless that party can satisfy the Board that the circumstances warrant granting leave. Although the Board may consider any factors it considers relevant, particular significance will be given to the reason why a party has failed to comply with the Rules and Practice Note.

9. In reviewing the circumstances here, the Board notes that it is the complainant, the party which can choose the timing for filing the complaint, which has failed to comply with Rule 60 and Practice Note #15 as well as its undertaking concerning area practice. In its complaint, Local 2995 did not indicate it intended to rely on area practice and it failed to comply with its undertaking concerning area practice. Local 2995 only advised the parties with respect to its intentions with respect to area practice a short time before the first day of hearing on the merits. With respect to this failure, Local 2995 did not provide us with any satisfactory explanation for why it did not comply with Rule 60 and Practice Note #15. Similarly, no satisfactory explanation was given by the Local 2995 for failing to include C-1 and C-2 with its complaint. The fact that Local 2995's representative did not check the Local's general correspondence and discover C-1 and C-2 until just prior to the pre-hearing conference does not constitute a satisfactory explanation. The evidence of area practice and C-1 and C-2 were in the possession of Local 2995 when it filed its complaint and the failure to comply with Rule 60 and Practice Note #15 is attributable only to Local 2995. In exercising its discretion, the Board was satisfied, given all of the circumstances and particularly those referred to above, that it would have been inappropriate to grant Local 2995 leave to introduce C-1 and C-2 or any evidence of area practice.

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20. We agree with those comments. We would add that since the Practice Note was amended, in August, 1988, a significant number of jurisdictional complaints have been filed with the Board. The Board's experience has reinforced the merit of requiring such pre-hearing disclosure and of not giving leave, without very good reason, to lead evidence of material facts not properly disclosed. A far greater number of these complaints now settle or take significantly less time to litigate because of these requirements.

21. We do not agree that the Board's practice has led the community, and the parties here, to believe that parties need not file job lists in their Briefs. There is no decision that supports Local 598's contention in this respect. It relied upon the decision in *Acco Canadian Material Handling*, (unreported, Board File #2841-88-JD, July 18, 1989). But that decision arose in a different context, where all parties were directed to file job lists. In *Acco*, there was a dispute over the description of the work in dispute, and after the Board ruled on that issue, the Board indicated which past practice would be relevant (that is, only with respect to two types of conveyors). The Board there concluded that its ruling necessitated providing further opportunity to all parties to file further job lists. The Board there identified the information required for each job. None of the same type of information has been provided here by Local 598. (It is worth noting that *Acco* where adequate job lists had not been filed by anyone in their Briefs, apparently took approximately 45 hearing days to litigate.)

22. Counsel for Local 598 also relied upon the decision of the Board in *Vic West Steel Limited*, (unreported, Board File #0013-90-JD, November 28, 1991), an ongoing complaint. But that decision does not support Local 598's position either. The Board stated:

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2. Although the Ontario Sheet Metal workers' and Roofers' Conference and Sheet Metal Workers International Union, Local 539 (the "Sheet Metal Workers") are the complainants herein, the reason this complaint has been brought is that the United Brotherhood of Carpenters and Joiners of America, Local 1256 (the "Carpenters"), a respondent herein, filed a grievance

against the respondent, Vic West Steel ("Vic West") complaining of the assignment to members of the Sheet Metal Workers by Vic West of work in connection with the installation of siding at a LOEB IGA Store and other buildings in a "retail strip" located on Exmouth Street in Sarnia. The Sheet Metal Workers description of the work in dispute is broad enough to encompass work in connection with the installation of all sheet metal siding at the job site in question. However, both in its brief and at the hearing on May 29, 1991, the Carpenters conceded (and were subsequently not permitted to resile from conceding) that the work in connection with the off-loading, handling, distribution, site transport, rigging, erection, installation and application of siding fastened to metal had, in this case and for purposes of this complaint, been properly assigned to members of the Sheet Metal Workers. In other words, the Carpenters disputed the assignment of, or claim, in this proceeding, only that work in connection with the off-loading, handling, distribution, site transport, rigging, erection, installation and application of siding fastened to wood. Therefore, that is, as the Board pointed in its May 29, 1991 decision herein, the work in dispute in this case.

3. That being the case, it was not obvious to the Board why it would be necessary, having regard to the Carpenters concession, to hear evidence of the practice regarding the assignment of work in connection with the installation of siding onto anything other than wood (although the Board did appreciate that evidence with respect to jobs on which siding was applied to or installed on both wood and some other sub-structure could be of assistance). The Board therefore interrupted the proceedings to explore the need for such evidence with the view to expedite the proceedings.

4. From what followed, it emerged that the positions of the parties are such that it will be necessary for the Board to hear evidence regarding the practice of assigning work in connection with the installation of siding on all sub-structures. However, it also became apparent that there might be a more expeditious way to do it than through a parade of witnesses. The Board therefore directed the parties to provide the following information *with respect to all job sites listed in their materials with respect to which they had called, or intended to call, evidence:*

[emphasis added]

- a) the date(s) of the job;
- b) the location of the job;
- c) the names of all contractors involved with the contracts for and application of siding on the job together with an indication of which of the two unions involved in this case each such contractor had a collective bargaining relationship with at the time;
- d) the square footage of the siding installed;
- e) the man-hours the job took to complete;
- f) the sub-structure(s) onto which the siding was applied or installed;
- g) the trade to which the siding work was assigned and, if different, which trade did the work.

Further, the Carpenters were directed to particularize the factual basis for its "Sarnia Construction Association" argument as mapped out at the November 26, 1991 hearing.

5. It appeared that all of this information was, or should be, readily available to the parties. Indeed, it was the very information with respect to which various witnesses had already been examined.

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23. The Board in *Vic West* was not giving leave to lead evidence of jobs not identified in the

Briefs. Rather, it ordered that additional information be provided with respect to the “job sites listed in their materials”, in order to reduce the length, expense, and delay, in the hearing.

24. Neither of these decisions therefore, can be said to establish any reasonable expectation in the community that the Board will not enforce Practice Note #15. The decisions on point are clear and unequivocal, and in contrast to the position of Local 598. The Board in *Spruce Falls* (*supra*) demonstrated no uncertainty or ambivalence in its decision. It indicated that the Practice Note means what it says.

25. The Board recently issued another decision confirming this approach. In *E.S. Fox Ltd.* [1992] OLRB Rep. Feb. 145, the Board wrote:

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6. In paragraph 17 of its brief, the complainant pleads that:

It is submitted that area and industry practice support the assignment of the work in dispute to the Millwrights. In particular, work of a similar nature was assigned to the Millwrights.

Was the work referred to the same or merely similar? If it was “similar”, how was it different, and how was it the same from the work in dispute in this case? What are the particulars of the area and industry practice relied upon by the complainant? That is, what was the work and the nature of the project where it was done? When was it done? Where was it done? Who was the employer which assigned the work? Was the work done on a sub-contract? With which trade union(s) did all of the companies involved have collective agreements?

7. In the brief submitted by the respondents Sheet Metal Workers International Association, Local 269 and Ontario Sheet Metal Workers’ & Roofers’ Conference (the “Sheet Metal Workers”), they plead at paragraph 10 that:

It is the practice of the Respondent E. S. Fox Ltd. to assign the Work in Dispute to the Sheet Metal Workers. On at least two prior occasions, the installation of a furnace at Alcan Canada Ltd. has been performed by Sheet Metal Workers.

In what way was the work involved in the “installation of a furnace of Alcan Canada Ltd.” like the Work in Dispute herein? When and where was the work done? Who assigned the work? With which trade union(s) that the assigner of work have a collective agreement?

8. In paragraphs 11 and 12, the Sheet Metal Workers plead that:

The Work in Dispute at the Project should be performed by employees experienced in doing work of this nature. Since Sheet Metal Workers members have always been associated with the Work in Dispute and other similar work, they are more qualified to perform the same than are members of Local 1410.

Throughout the province of Ontario, including OLRB Geographic Area #29, it is the well established practice of employers bound to the Sheet Metal Workers’ Collective Agreement to assign the Work in Dispute to members of the Sheet Metal Workers. They have the skills, ability, experience and qualifications to perform such work in a competent and efficient manner.

What “similar” work is of relevance? What training, skills, ability, experience or qualifications do members of the Sheet Metal Workers have which favours the assignment of the Work in Dispute herein to them?.

9. In paragraph 15, the Sheet Metal Workers plead:

It is the practice of employers bound to the Sheet Metal Workers’ Collective Agree-



ment throughout the province of Ontario, including Board Area #29, to use Sheet Metal Workers to perform the Work in Dispute. As such, the Millwrights demand for the work is disruptive of industrial relations stability in the province.

What are the particulars of the practice being pleaded? Is the practice relied upon by employers bound to a Sheet Metal Workers' Collective Agreement as well as to a collective agreement with the complainant? In what way is the complainant's demand for the Work in Dispute disruptive of industrial relations stability?

10. The respondent employer's brief is similarly lacking in particularity, especially in paragraphs 3, 5, 6 and 7.

11. The above is intended to be illustrative rather than exhaustive. Further, it illustrates not only the deficiencies in this instance but also a general tendency by parties to submit "boiler plate" briefs in complaints with respect to the assignment of work. This approach is both counter productive and not in keeping with either the intent or letter of Board Practice Note #15. It not only retards and undermines the pre-hearing process, but also tends to prolong and complicate unnecessarily the hearing of such a complaint.

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26. In summary, we are satisfied that the practice of the Board has been clear. While it may be that certain panels have not exercised their discretion identically (nor would one expect them to), at best it can be said that parties take a significant risk when they fail to file properly particularized Briefs.

27. There is no doubt that the material facts with respect to area or employer past practice include, at the very least, sufficient information by which the parties, and the Board, can identify the projects upon which a party seeks to rely.

28. Simply listing the names of employers does not provide sufficient information to constitute the "material facts". The parties are unable to properly investigate what occurred at particular projects, and they cannot attend at the Pre-Hearing Conference with information as to the practice of particular employers. They will not be aware of the particulars being alleged as to the past practice. The effectiveness of the Pre-Hearing Conference lies in its ability to narrow the issues or to settle the matter. Past practice is of paramount importance in determining whether unions will fight over particular assignments, and in determining the correct assignment in any particular circumstance. If parties do not particularize the practice upon which they intend to rely, the entire process is undermined.

29. We are therefore satisfied that Local 598 was required to file job lists, as part of the requirement to disclose the material facts upon which it intends to rely, and it neglected to do so. We see no reason in the circumstances before us to give leave to Local 598 to either file those job lists now, or to be allowed to lead any evidence with respect to area practice. Local 598 had ample opportunity to file those lists in its Brief, and it has no reasonable excuse for its failure to do so. The fact that Local 598 was not the bargaining agent prior to September, 1988 is not a reasonable excuse for its failure to file the material facts in the instant application. Nor is the financial state of Local 598 a reason to relieve it from the obligation to file material facts. Pursuing expensive, often protracted, litigation is not the means to discover what the relevant practice has been. Local 598 will not be allowed to lead any evidence of area practice.

30. We turn next to the question of employer practice. Neither the Labourers' nor Ellis Don seek to lead evidence of employer practice outside Board Area 3. They both argue that the work in question is basic work, done on many occasions by the employer, throughout the province. It would be too expensive, they submit, in terms of litigation costs, and would cause too much of a

delay, for the Board to hear evidence of the employer's practice from around the province. Further, it would be of little practical assistance to hear evidence of employer practice outside Board Area 3, when there exists such an extensive practice within that Board Area. They argue that only evidence of practice in Board Area 3 ought to be allowed. Local 598 argues that existence of employer practice throughout the province is relevant and ought to be entertained.

31. The Board reserved on this issue at the hearing. We conclude that evidence of employer practice (provided it has been properly pleaded) throughout the province will be allowed. The parties do not agree on the material facts with respect to the practice of Ellis-Don in Board Area 3. This is I.C.I. sector work, work performed in a province-wide sector and scheme, where there can be province-wide practices. At the end of the day, the Board may well conclude that evidence of practice outside Board Area 3 is of little assistance. For example, if the practice of Ellis Don within Board Area 3 is to consistently or predominantly use members of one trade, it may be that Ellis-Don's practice in other parts of the province is largely irrelevant. However, we are not prepared to preclude parties from relying on that evidence.

32. Evidence of employer practice must still have been properly pleaded in the Briefs. In paragraph 17 of its Brief, Local 598 refers to employer practice. The Brief notes that it is the practice of Ellis-Don when performing the work in dispute to directly assign the work to members of Local 598. It states that "Ellis-Don also assigns the work in dispute exclusively to members of Local 598 in Toronto, Kitchener, Oshawa, Hamilton, Barrie and surrounding areas". At Tab 13 of its Brief, Local 598 lists job sites together with the location of the particular job, to the extent of identifying the name of the site (e.g. "I.B.M. Phase I", "Le Hotel") and the city or town in which the job site was found.

33. We are concerned that the information provided by Local 598 is not sufficient to enable the other parties to sufficiently identify the projects in question, in order to investigate what took place on those projects, and in order to come prepared to the Pre-Hearing Conference and the hearing. However, there was no suggestion that the detail provided by Local 598 was insufficient to allow the other parties to properly identify the projects in question, nor is it apparent how the other parties would be prejudiced by the lack of detail with respect to these projects. We are prepared therefore, to give Local 598 the benefit of the doubt. Local 598 will be allowed to lead evidence of employer practice with respect to the job sites listed in its Brief.

34. The last preliminary issue was the question of whether to exclude evidence of employer practice of employers who have bargaining relationships with the Labourers' for cement finishers. This was the issue referred to above in paragraph 4. Local 598 submitted that this case really raised questions of overlapping bargaining rights, rather than overlapping work jurisdictions. In its Brief, at paragraph 14, it submitted that the Board ought "to confine its inquiry to employers who have a collective bargaining relationship with Local 598. Only then will evidence that the work in dispute is assigned to members of Local 1059 in preference to members of Local 598 assist the Board in determining whether the area practice is to assign the work in dispute to labourers over cement masons or vice versa". At the hearing, Local 598 argued that it was unfair for the Labourers' to be able to rely upon the practice of contractors with bargaining relationships with the Labourers' with respect to cement finishers, since the real contest was between construction labourers (where the Labourers' represent a bargaining unit described as "construction labourers"), and cement masons. Local 598 referred to two decisions in support of its argument, *Runnymede Development Corporation*, [1987] OLRB Rep. Oct. 1305, and *Doug Chalmers Construction Limited*, [1990] OLRB Rep. July 788. It submitted that the only employers that ought to be considered by the Board ought to be those which had bargaining rights with the Cement Masons, or with them and

the Labourers', but excluding those employers which had agreements with the Labourers' covering cement finishers.

35. The Board orally ruled that it would not restrict the evidence in the fashion requested. The Board was being asked, at the beginning of the case, to limit the evidence of area practice of employers based upon the bargaining relationships and collective agreements those employers had with the two particular unions, and more particularly, based upon whether the Labourers' represented "cement finishers" on a particular project. It was not appropriate to do so. The parties can lead evidence of the practice of employers in Board Area 3 who have used members of the Labourers' or Local 598 to perform work similar to the work in dispute.

36. This matter need now be rescheduled. During the Pre-Hearing Conference, the Board set for hearing, on the parties' agreement, April 27, May 19, 20, 21, 25, 26, 27, June 24, 25, July 6, 7, 8, 14 and 15, 1992. Shortly before April 27, that date had to be adjourned, as counsel was unavailable at the last moment, for personal reasons. On May 5, 1992, Local 598 wrote to the Board indicating that the parties had agreed to adjourn May 25, 26, 27, June 24, 25, July 6, 7, 8, 14 and 15, 1992, leaving only May 19, 20 and 21 for the hearing, which the parties had agreed would be used only to address preliminary issues. Those preliminary issues have all been addressed above. It took only one day of hearing to hear them all, resulting in May 20 and 21 being cancelled.

37. In the result (excluding April 27, which cancellation was unforeseen, unavoidable and understandable) there were 13 days set by the Board for hearing, but the parties on consent adjourned 12 of them. In these circumstances, we are not prepared to tie up further scheduling dates, at cost to other parties and the Board, to accommodate the convenience of the parties.

38. Accordingly, we do not propose to set further hearing dates. This matter will be adjourned until August 1, 1992. If the Board does not receive by that date a request that this matter be relisted for hearing, this application will be terminated. If the Board does receive such a request, the party making the request is to make the request in writing and at the same time copy the other parties. All parties will have 7 days from the date the request is received to notify the Board, in writing, of their available dates for hearing. There will be no consultation with the parties with respect to available dates. The letters should indicate the total number of days each party feels will be needed for the presentation of their own evidence, and their submissions. The Board will then set dates for hearing.

39. We note that the parties are agreed (paragraph 9, Pre-Hearing Conference Memorandum) that Local 1059 will proceed first with its evidence, followed by Ellis-Don, and then Local 598. The parties are to be prepared to lead their evidence and make submissions at the resumed hearing.

40. Any future adjournment requests must be received by the Board no later than two weeks prior to the hearing dates in question. Failing this, the parties will have to attend at the hearing to speak to any adjournment request.

41. This matter is referred to the Registrar.

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**2854-91-JD** Ontario Sheet Metal Workers' and Roofers' Conference Sheet Metal Workers International Association, Local 504, Complainants v. **Felix Lopes Sheet Metal Ltd.**, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener

**Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Work in dispute assigned to Sheet Metal Workers' union, and Plumbers' union filing grievance against employer - Sheet Metal Workers' union then filing jurisdictional dispute complaint against employer - Plumbers' and employer subsequently settling s. 126 application and asking that jurisdictional dispute be dismissed - No remaining work assignment dispute between the two trade unions - Board dismissing complaint and declining Sheet Metal Workers' request to award costs against Plumbers' union**

**BEFORE:** *Robert Herman*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

**APPEARANCES:** *S.B.D. Wahl* and *J. Ouellette* for the complainants; *A. J. Ahee* and *M. Zangari* for the respondents.

**DECISION OF THE BOARD;** June 16, 1992

1. This is a jurisdictional dispute complaint filed pursuant to section 93 [formerly section 91] of the *Labour Relations Act*.
2. The dispute between the parties involved the installation of Variable Air Volume boxes, and specifically, by the time this matter came on for hearing, those Variable Air Volume boxes which contained heating and/or cooling coils.
3. The work in dispute was assigned to Sheet Metal Workers Local 504, and amongst other responses, the Plumbers Local 800 filed a grievance against the respondent Felix Lopes Sheet Metal Ltd., and subsequently filed an application with this Board pursuant to section 126 [formerly 124] of the Act. The parties in effect agreed that the section 126 application would be deferred to allow the filing of instant jurisdictional dispute.
4. In the result, Sheet Metal Workers Local 504 filed the instant complaint, naming Plumbers Local 800 and Felix Lopes Sheet Metal Ltd. as respondents. As required, the parties filed extensive pre-hearing Briefs, and a pre-hearing conference before a panel of the Board was convened. As the matter remained unsettled, it was listed before the instant panel for a hearing on the merits. However, shortly before the hearing on the merits was to begin, Plumbers Local 800 and the employer, Felix Lopes, settled the section 126 application, through signed Minutes of Settlement. The Plumbers asked that its section 126 application be withdrawn, and further, that the instant jurisdictional dispute be dismissed, as there was no longer a dispute between the unions over the assignment in question. The Sheet Metal Workers opposed the request that the instant complaint be dismissed, arguing that there were good reasons for the Board to hear the merits of the jurisdictional disputes, notwithstanding the settlement of the section 126 application which had led to the filing of the instant complaint in the first place.
5. With respect to this latter issue, the Board heard the submissions of the parties, and delivered an oral decision at the conclusion thereof, as follows:

We are going to dismiss the instant complaint.

There has been no history of litigation before this Board over the dispute with respect to the work in question, the installation of Variable Air Volume boxes. We do accept, for purposes of our ruling here, that a problem still remains between Locals 800 and 504 over whose work this is, and that problem or dispute has not been resolved. As disclosed in the pre-hearing Briefs, and subsequently discussed in the Pre-Hearing Conference Memo, the parties remain in dispute over who is entitled to do the installation of the Variable Air Volume boxes which contain heating and/or cooling coils. While there is no longer a dispute over the entitlement of the Sheet Metal Workers to install those boxes that do not contain coils, the dispute remains over those containing coils, with the Plumbers taking the position that a composite crew should be assigned for such installation, and the Sheet Metal Workers arguing that it is their work.

We recognize that the Minutes of Settlement filed in the section 126 application have not resolved this dispute, if only because those Minutes bind only the United Association Local 800 and Felix Lopes, and not the Sheet Metal Workers, and because in any event, insofar as the correctness of the assignment is concerned, the terms of the settlement indicate only that future assignments will be according to the trade agreement of August 31, 1956, and the evidence that is disclosed as part of the required mark-up meetings. It is apparent therefore, that another dispute might be filed over this type of work, either with respect to an assignment by the same employer, Felix Lopes, or another employer or a contractor.

Nevertheless, the Board agrees with the recent trend of Board decisions, where the Board has been loathe to litigate matters as jurisdictional disputes unless it is necessary to do so, and even then, only when it becomes so necessary. Cases are not automatically deferred to the filing of a jurisdictional dispute until it is appropriate to hear the particular dispute in that fashion. We do not imply in any way by this comment that a section 126 application is the appropriate vehicle for resolving work assignment disputes between two unions. Rather, section 93 remains the appropriate vehicle for the litigation resolution of such disputes.

Here, there is no remaining work assignment dispute between the two trade unions in this proceeding. A crystallized dispute may again arise in the future but it can be dealt with in the future. Given this, the Board will not proceed further with this complaint: see, for example, *J. R. Mechanical Inc.*, [1991] OLRB Rep. Aug. 999. The Board has a discretion under section 93 to entertain a complaint. We are satisfied here that it is not appropriate to exercise that discretion to hear the merits of the complaint. The grievance giving rise to this particular jurisdictional dispute has been resolved, and there is no outstanding dispute with respect to the particular assignment in question which would justify this matter proceeding further. To go ahead with the complaint in these circumstances would as well be a disincentive to the settlement process. Accordingly, the Board will proceed no further with the instant complaint.

With respect to the request that Plumbers' Local 800 pay costs to the complainant, we decline to award costs. Assuming the Board had the jurisdiction to do so, it is not in our view appropriate to do so here. Cases before the Board regularly get settled at the last minute, with no costs being ordered. We see nothing exceptional before us to justify our departure from this general approach. To order costs in the circumstances would we feel be a further disincentive to the settlement process.

For these reasons, this case will be dismissed.

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**0237-92-U The Former RNA'S of Mount Sinai Hospital, Complainant v. Service Employees International Union, Local 204, Respondent**

**Duty of Fair Representation - Unfair Labour Practice - Union grieving permanent lay-off of 52 employees - Some employees signing release in order to receive immediate severance pay and, consequently, withdrawing their claims under grievance procedure - Union subsequently settling grievance, securing monetary compensation on top of severance pay - Whether union violated *Act* when it failed to tell employees before they signed releases that a few days later there would or might be a settlement giving remaining grievors more monetary compensation - Complaint dismissed**

**BEFORE:** *S. Liang*, Vice-Chair.

**DECISION OF THE BOARD;** June 15, 1992

1. This is a complaint under section 91 of the *Labour Relations Act*. In this complaint, a group of Registered Nursing Assistants (referred to in this decision as "the RNA's") represented by the respondent, the Service Employees International Union, Local 204 (referred to in this decision as "the union"), complain that they have been misled and improperly represented by the union. The RNA's state that the union did not make them fully aware of all of the consequences of withdrawing from a policy grievance, and signing a release. In particular, they complain that the union failed to tell them that several days after their signing of a release, the union would settle the grievance on behalf of the remaining RNA's, for greater compensation.

2. On the consent of all parties, Mount Sinai Hospital has been removed as a respondent to the complaint, but given status to participate in the proceedings.

3. This complaint is based on section 69 of the *Act*, which states:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

4. Valda Lee and Gloria Bernard testified on behalf of the group of RNA's, and Brad Philp, a business agent, on behalf of the union. It was agreed between the parties that the Board would accept Ms. Bernard's and Ms. Lee's evidence as going to the complaints of all the members of the group.



5. The complaint is based on events which took place after Mount Sinai Hospital decided to lay off all the RNA's working for the hospital. The union was advised of this lay-off, which included other employees in addition to the RNA's, on February 6, 1992. In all, 27 full-time and 25 part-time RNA's received notices of lay-off on this date. The lay-off took effect on April 3, 1992. On February 14, 1992, the union filed a policy grievance on behalf of the employees. Under this grievance, among other things, the union requested reinstatement with full compensation for the employees. The grievance is based essentially on an allegation that the hospital failed to give proper notice and an opportunity for discussion of its decision. The union also filed a complaint with the Pay Equity Commission with respect to the hospital's decision to lay off all its RNA's.

6. On March 30, a meeting was held with the RNA group, and representatives from the hospital and the union. In this meeting, the hospital representative, Sally Lewis, explained to the RNA's that they had two options. If they wished to receive immediately the severance pay to which they were entitled under the *Employment Standards Act*, they would be asked to sign a release. It was explained to the group that the consequence of signing the release would be that the employee had withdrawn her claim under the grievance. However, if an RNA chose not to sign the release and chose to continue with the grievance, she would not get the severance pay immediately, but have to wait the outcome of the grievance. It was explained that all RNA's had the right to receive severance pay, but that the decision over whether or not to sign the release would affect the timing of the payment of the severance pay. Ms. Lewis also explained that in the hospital's opinion, the grievance would not succeed in reinstating the RNA's.

7. During this meeting, the employees were handed a letter signed by Brad Philp (who was also in attendance), stating as follows:

The Union wishes everyone to know that anyone signing this release will no longer have any right to argue that they should be reinstated to their job at Mount Sinai but will be entitled to receive their severance payment immediately.

Those not signing the release will not be entitled to receive their severance payment at this time but they will continue to have the right to argue before an arbitration hearing scheduled for April 9th that their termination was improper and they should be reinstated with compensation for any loss of wages or benefits. If the grievance is unsuccessful and an employee is not reinstated, then such an employee would be entitled at that time to receive the severance payment now being paid to those who are signing the release.

While the first hearing date is scheduled for April 9th, it is uncertain when a decision will be made as to whether employees who do not sign the release are to be reinstated or not.

If you require any further information concerning this matter, please contact the Union office.

8. The text of the above letter was drafted by the lawyer for the union. The terms of the release referred to during this meeting were approved by the lawyers for the hospital and the union. Mr. Philp stated that he wanted to give the RNA's the letter of March 30 because he felt that the release would not be clear to them, and he wanted an explanation in laypersons' language of the consequences of signing the release.

9. After the meeting with the hospital, Brad Philp held a separate meeting with the RNA's. Among other things, he stated in this meeting that despite the hospital's opinion that the grievance would not succeed, the union intended to go ahead with the grievance. He also confirmed that the first day for the arbitration hearing was scheduled for April 9. In response to questions, he stated that it was possible that the grievance may take 18 months to conclude (one of the witnesses stated that she heard Mr. Philp say it could take 18 months to two years). One of the employees stated that there was a rumour that the hospital was offering a cash settlement. Mr.

Philp stated that he had not heard that, but if it was true, the union would take a look at it. Nothing else was said or asked about the possibilities of settlement.

10. Between March 30 and April 3, 28 RNA's signed the release in the hospital's personnel office. There was no contact between the RNA's and the union on these issues between the meeting of March 30 and the signing of the release by individual RNA's. The form of this release is as follows:

RELEASE

Re Notice of Layoff to R.N.A.'s

The undersigned hereby acknowledges receipt of the appropriate severance pay under Section 40a(1c) of the Employment Standards Act and proper notice under Section 40. The undersigned has elected to accept such severance pay and waives any right of recall under the provisions of the applicable Collective Agreement. In consideration of the payment of such severance pay, the undersigned hereby abandons any remedy, including reinstatement, that may otherwise have been appropriate under an alleged "Policy Grievance" filed on my behalf February 14, 1992 by Service Employees International Union, Local 204 or any other grievance that may have been or will be filed by me or on my behalf and arising out of my notice of layoff on or about February 6, 1992.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

\_\_\_\_\_  
Mount Sinai Hospital

\_\_\_\_\_  
Service Employees International Union, Local  
204

11. Sometime after March 30, Mr. Philp was informed of a meeting to be held between the hospital and the union on April 6. This meeting was arranged between the lawyers for the hospital and the union. The lawyers for both sides were present at this meeting, along with representatives of the hospital and union. At this meeting, a settlement was reached in which the hospital agreed to compensate the remaining grievors for the wages lost during a period of 45 calendar days, in addition to their severance pay. The settlement was without prejudice to the union's complaint under the *Pay Equity Act*.

12. Upon hearing of the terms of the settlement, the RNA's who had signed releases prior to the settlement meeting became very upset. A few phoned Mr. Philp. Valda Lee and Mr. Philp both testified about a conversation between them over the telephone on the issue. They have conflicting versions of the conversation, but it is clear that Ms. Lee was angry with Mr. Philp and felt that he had misled the RNA's, and made that known to him. Ms. Lee states that he was rude to her during this telephone conversation and at one point, threatened to sue her. This is denied by Mr. Philp. On April 22, this complaint was filed with the Board.

13. Joanne Amatuzio spoke on behalf of the group. She states that the RNA's feel they were not made aware by the union of all of the options. At the time they signed the release, they were not aware that a few days later, the union would enter into a settlement which provided the group of RNA's remaining in the grievance with monetary compensation on top of severance pay. The group feels that the union should have told them there might have been a cash settlement. Ms. Amatuzio stated that the RNA's have no complaint as to the settlement itself, but feels they should have been told it was an option. Their understanding of the grievance was essentially that it was

about reinstatement. If the grievance won, the RNA's would be reinstated. If the grievance lost, they would not be reinstated; however, they would still get severance pay. The RNA's look for an apology from Mr. Philp and the union, and payment equal to the settlement given to the other RNA's.

14. Counsel for the union, Ms. Trachuk, states that the evidence before the Board does not support a conclusion that the union acted in bad faith, or was arbitrary or discriminatory in the way it handled this issue. Mr. Philp testified that up until the meeting of April 6, he did not know of or expect there to be any settlement of the grievance. In fact, Ms. Trachuk submits, it is very likely that the grievance settled precisely because so many people indicated they were unwilling to participate in it, by their signing of the releases. She states that the documents given to the employees, the letter and the release, make it clear to the RNA's that there is a monetary aspect to the grievance, i.e. that the claim under the grievance included reinstatement with back pay and benefits. Also, Ms. Bernard stated in evidence that it was her understanding that a possible outcome of the grievance was that the RNA's would be reinstated with pay and then laid off again once the hospital had given proper notice. Thus, the RNA's could not say that they did not or could not have known that there was a monetary element to the grievance. Further, even if there was confusion amongst the employees on this, it was not as the result of any conduct by the union in violation of section 69.

15. Ms. Trachuk also stated that there was nothing objectionable in the results of the settlement meeting. At that point, the union understood there to be 18 people remaining in the grievance, and negotiated the settlement on that basis.

16. Further, she points out that, in fact, the union in no way encouraged any R.N.A. to sign the release. Instead, the evidence was that the hospital stated its opinion that the grievance would fail, while Mr. Philp made it clear to the group that the union would continue to fight the layoffs through the grievance. Mr. Philp testified that he thought he had succeeded in discouraging the group from signing the release, and he was not pleased to find that so many of them had decided to abandon the grievance. He stated that he only found out at the meeting of April 6, from the hospital, exactly who had decided to sign a release. Ms. Trachuk states that the union cannot be held responsible if employees chose to believe the hospital's view of the merits of the grievance, instead of the union's.

#### Decision of the Board

17. The decision I have to make in this case is whether the union violated the *Labour Relations Act* when it failed to tell the complainants before they signed the releases, that a few days later, there would or might be a settlement giving the remaining RNA's more monetary compensation.

18. As set out above, section 69 of the *Labour Relations Act* is quite specific in the kind of conduct that it prohibits. It states that a union shall not be arbitrary, discriminatory, nor shall it act in bad faith in its representation of employees. What do the words of section 69 mean? In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, the Board stated:

36. Section 68 [now section 69] requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad Faith" and



“discriminatory”, therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. “Arbitrary”, on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

19. The concepts of “bad faith” and “discrimination” are relatively easy to understand. A union acts in bad faith or is discriminatory when its actions towards an employee are motivated by animosity, prejudice or spite. In this case, the complaint is that the RNA’s were left completely in the dark about what might happen, and were misled into signing a release which resulted in disadvantage to them. Although they cannot know for sure, the RNA’s question whether the union knew as of March 30, that there would very shortly be a settlement of the grievances, with additional monetary compensation.

20. I might view this as a case of bad faith or discrimination if I could conclude that there was some deliberate deception or withholding of information on the part of the union, motivated by ill-will or prejudice. However, Mr. Philp testified, and I accept his evidence, that as of March 30, he had no reason to think that there would be any settlement of the grievances. He states that he was not feeling very optimistic about any settlement of the grievance at all. As of March 30, he did not know that there was to be a meeting to discuss settlement on April 6. Further, I do not have any evidence that would lead me to conclude that Mr. Philp bears ill-will or prejudice towards the RNA’s. There is no doubt that heated words were exchanged between Mr. Philp and Ms. Lee after April 6; however, I do not conclude from this that his actions towards the RNA’s before April 6 were motivated by ill-will towards the group, or that he discriminated against the group.

21. If the union did not act in bad faith and did not discriminate against the RNA’s, were its actions nevertheless “arbitrary”? In a previous decision, *I.T.E. Industries Ltd.*, [1980] OLRB Rep. July 1001, the Board has discussed the standard of behavior required from a union so as not to be “arbitrary”:

... While the Legislature undoubtedly sought to protect the employee from an abuse of the union’s authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

“40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the forms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al*, 8 D.L.R. (3d) at p. 546”.

...

19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a “flagrant error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union’s conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union

simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

• • •

22. It is clear, then, that a union does not violate the Act simply because it has been careless, neglectful or made an error in judgment, unless the carelessness or error is as a result of a complete failure to put its mind to the problem. The Act does not require the union to justify every decision or action to the satisfaction of the Board, but does require the union to show that it considered the problem and fairly and honestly dealt with it.

23. On the evidence, I conclude that the union did consider the issue it was faced with, and tried to deal with the matter fairly and honestly. The union filed a grievance on behalf of the group of RNA's. As of March 30, it had no reason to think that the grievance would be settled. The hospital was prepared to pay immediate severance pay to the RNA's, but any RNA wishing to receive severance pay immediately would have to sign a release and withdraw from the grievance. A release was agreed to between the lawyers for the hospital and for the union. Then, the union had an additional letter drafted, dated March 30, which it hoped would explain the purpose of the release in more easily understood language. During the meeting of March 30, Mr. Philp did not encourage anyone to sign the release, but stated that the union had the intention of continuing with the grievance.

24. I see the letter of March 30, and the meeting that Mr. Philp held with the RNA's, as an honest attempt to deal with the issues facing the RNA's at that time. Unfortunately, the one area he did not cover either in the letter or in the meeting, was the possibility that the hospital may agree to settle the grievances with an additional payment to the RNA's. I consider this an oversight on the part of the union. I accept that it is possible, as it is argued, that the hospital's willingness to settle the grievances less than a week later came about *only* because a large group of RNA's had decided to withdraw from the grievance. However, in any grievance process, there is always a possibility of settlement, and settlements involving some compensation in exchange for withdrawal of a grievance are not uncommon. Although as of March 30, Mr. Philp had no reason to think that this grievance would settle, he would also know that this was always a possibility. The fact that one of the RNA's at the meeting of March 30 raised the rumour of an additional cash offer from the hospital shows how monetary settlements are commonly discussed.

25. Thus, I conclude that the union would have been wiser to have mentioned the possibility, however remote it seemed on March 30, that the grievance might settle for monetary compensation. The way the issue was put to the RNA's left them thinking that the only alternatives available were immediate payment of severance pay and withdrawal from the grievance, or a potentially lengthy grievance process. However, because I accept that the union had no reason to believe that there would be a settlement until April 6, I also conclude that the union's failure to mention this possibility was an honest oversight.

26. In the circumstances, I can understand the frustrations of this group of RNA's. Lacking any information as to what the union knew or should have known on March 30, it is not surprising that the RNA's felt that they had been treated unfairly once they learned of the settlement that was made on April 6. However, after hearing the evidence of both the RNA's and the union, I find that the union did not act in bad faith, nor was it discriminatory or arbitrary in its conduct and advice. Accordingly, this complaint is dismissed.

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**0173-91-U Peter Galiatsos, Complainant v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, Local 173, Respondent v. Famous Players Inc., Intervener**

**Duty of Fair Referral - Duty of Fair Representation - Unfair Labour Practice - Remedies - Complainant alleging that union violated the *Act* in removing him from his position in March 1991 and in the processes followed by the union thereafter - Union conceding that complainant had right to take his case concerning his removal to general membership for final decision - Board determining that union acted in arbitrary manner in refusing to allow complainant to present his request to remain in his position to membership for a vote - Board directing union to allow complainant to place his case before membership for its decision - Union also directed to notify all members in advance that the issue is to go before membership, to post Board's decision in the union's office and to provide copies to those members requesting it**

**BEFORE:** *Janice Johnston*, Vice-Chair.

**APPEARANCES:** *Peter Galiatsos* on his own behalf; *L. Steinberg*, *Mark Zigler*, *Robert Hilder*, *Graydon Hulse* and *Stanley Adams* for the respondent; *R. J. Harris* on behalf of the intervener.

**DECISION OF THE BOARD;** June 10, 1992

1. The style of cause is hereby amended to reflect the correct name of the respondent as: "International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173". The style of cause is also amended to add "Famous Players Inc." (the "employer" or "company") as the intervener.

2. This is a complaint filed pursuant to section 91 [formerly section 89] of the *Labour Relations Act* (the "Act") in which the complainant, Mr. Peter Galiatsos, alleges that the respondent, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local 173 (the "union" or "Local 173") has violated his rights in the administration of the union's hearing hall, contrary to sections 69 and 70 [formerly sections 68 and 69] of the Act.

3. Sections 69 and 70 of the Act read as follows:

**69.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

**70.** Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

4. The Board first convened as a three person panel to hear this matter as the complaint, as originally framed, alleged a violation of sections 71 and 82 [formerly sections 70 and 80] of the Act. After hearing the submissions of the parties, the Board made a number of procedural rulings. It is not necessary to outline them in detail. Various portions of the complaint were dismissed as either untimely, as disclosing no *prima facie* case pursuant to Rule 71, or for a failure to particularize pursuant to Rule 72 of the Board's Rules of Procedure. In addition, Mr. Galiatsos sought the leave of the Board to withdraw his allegations that section 71 and 82 of the Act had been violated. This request was granted by the Board. As the complaint at this point dealt solely with alleged vio-



lations of section 69 and 70 of the Act, the Board proceeded to hear this complaint with the Vice-Chair sitting alone.

5. Mr. Galiatsos' complaint primarily focuses on two specific incidents. The first concerns the matter of a \$100.00 fine levied against him on August 29, 1990 by the union. Mr. Galiatsos was fined for failing to remain in the projection suite during working hours. Although I heard some evidence on this point and documentation pertaining to the incident was filed with the Board, this incident was not pursued by Mr. Galiatsos in final argument. In any event, it is clear from the evidence before me that the matter of the \$100.00 fine should be characterized as an internal union matter. The Board's jurisprudence makes it clear that the Board does not act as a "watchdog" with respect to the internal proceedings of a union. As was pointed out in *Arthur Joseph Roberts*, [1974] OLRB Rep. Mar. 169.

... The case law indicates that the propriety of a trade union's behaviour vis a vis its members is governed by its constitution and by-laws and the procedural remedies provided therein. And recourse must be made by an aggrieved member to the governing rules provided under the constitution for relief. The safeguard provided by the controlling supervision of the courts are his assurance that these rules will be implemented fairly and impartially. (see; *White v Kuzych* (1951) A.C. 585; *Lee v Showmans Guild* (1952) A11. E.R. 1175; *Orchard v Tunney* (1957) S.C.R. 436; 8 D.L.R. 273; *Jurak et al v Cunningham* (No. 1) (1959) 20 D.L.R. (2d) 377; *Jurak et al v Cunningham* (No. 2) (1959) 20 D.L.R. (2d) 381; *Gee v Freeman et al* (1958) 26 W.W.R. 546).

...

This portion of the complaint is therefore dismissed.

6. Although there are various allegations raised by Mr. Galiatsos, the second main incident which formed the basis of his complaint concerned his removal by the union from the Cumberland Cinema in March, 1991 and the processes followed by the union thereafter.

7. Mr. Galiatsos was not represented by legal counsel in these proceedings. Accordingly, the Board at the commencement of the hearing explained to Mr. Galiatsos that there is no requirement that persons retain legal counsel and that many parties choose to appear before the Board unrepresented. It was indicated however that the proceeding is a legal proceeding and that persons appearing on their own behalf must bear any risks involved with doing so. The Board advised the complainant that we could explain the process to him but that we could not advise him on how to proceed. It was explained that it was his responsibility to prepare and present his case. It is the role of the Board to adjudicate in the proceedings, therefore it would inconsistent with that role for us to provide one party with legal advice at various stages in the proceeding.

8. The Board also advised Mr. Galiatsos at the beginning of the hearing that the onus of proving that the union had violated sections 69 and 70 of the Act lay with him. In reviewing the process to be followed at the hearing it was explained that witnesses would be sworn and give their evidence under oath. The Board indicated that Mr. Galiatsos was to proceed first to call his evidence followed by evidence from the company (if any) and then the union. After Mr. Galiatsos had been given the opportunity to call reply evidence the parties would be called upon to make final submissions.

9. The Board heard evidence from seven witnesses (one of whom was called twice by the complainant) over eight days of hearing. Before turning to the specifics of their testimony I feel it is helpful to make some general observations concerning the credibility of some of the witnesses. The complainant testified on his own behalf and called two witnesses, the company's representative at the hearing, Mr. R. J. Harris, Director of Central Operations and Mr. William Hunt, a co-

worker. The union called four witnesses: Mr. Ilias Tsiobanos, a co-worker of Mr. Galiatsos'; Mr. Graydon Hulse, the business agent for the union in March, 1991; Mr. Stanley Adams, the President of the union; and Mr. Robert Hilder, the current business representative of the union.

10. Mr. Harris, Mr. Adams and Mr. Hilder were all very credible witnesses. They were candid and gave their evidence in a straightforward manner, answering the questions asked of them to the best of their ability. The same cannot be said for Mr. Hulse and Mr. Tsiobanos. They were very responsive to questions asked by union counsel and the Chair, but in cross examination both were, at times, argumentative, evasive, motivated by self interest and suffering from convenient memory lapses. In fairness to them, it was clear to me that both of these witnesses had difficulty being cross examined by the complainant and that the dynamic created by this fact was the primary cause of their non-responsive behaviour. As a witness, Mr. Galiatsos was responsive, honest and gave his evidence to the best of his recollection. However, his recollection of events was often different from that of other witnesses. As the hearing progressed, I observed concrete examples of Mr. Galiatsos's inability to accurately recollect events and statements made by others. On numerous occasions in cross examination Mr. Galiatsos, in the course of asking a question, would put to a witness either evidence he believed the witness had given earlier or evidence that another witness had given earlier. Virtually without exception, Mr. Galiatsos misquoted the evidence. It appeared to me that this was not done in a devious manner or with the intent of misleading the Board. Mr. Galiatsos does not listen carefully and as a result does not hear what people are saying. He hears what he wants to hear.

11. The union and the intervener are bound to a collective agreement. It provides in part as follows:

- 2.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for motion picture machine operators (hereinafter sometimes referred to as "Projectionists") employed by the Employer within the territorial jurisdiction granted to the Union by the International Alliance of Stage Employees and Motion Picture Machine operators of the U.S. and Canada on the effective date of this Agreement. The Employer agrees to employ only motion picture machine operators supplied by Local 173 and further agrees to only employ members of the Union who are in good standing. It is, however, the responsibility of the Union to inform the Employer if a member is not in good standing.
- 2.02 The Union agrees to supply competent and efficient projectionists to perform work as required by the Employer under the provisions of this Agreement. Both parties agree to make every effort not to permit employees covered by this Collective Agreement to contravene the provisions of the Employment Standards Act in complying with this Agreement.

Once the employer notifies the union that projectionist work is available, the work is filled in accordance with internal union practices.

12. The union in this case holds bargaining rights for film projectionists in the Toronto area under at least two collective agreements. Under these agreements the members obtain work through the union's hiring hall. Mr. Harris in his evidence indicated that the union determines the number of projectionists who will work in any particular theatre. The employer plays no role in the allocation of work opportunities or in the determination as to how many permanent jobs shall exist in a theatre. The union supplies the workers and the employer only requires that they be competent.

13. There are three categories of work, permanent or steady work, permanent relief work and relief work. The union's constitution provides that all steady work or jobs are the property of



the union and are to be filled in order of seniority at a general membership meeting. When a steady position becomes available it is posted in the union office for seven days before it is offered at a membership meeting. Members can put in a written application or bid on the job at the membership meeting. Steady jobs guarantee the member a set number of hours per week (and therefore guaranteed earnings) at a specific location.

14. Relief work assignments are essentially fill-in work. Relief work becomes available in a variety of situations such as illness, vacation, or leave of absence on the part of the steady or full-time projectionist(s) and can be from one shift to three months in duration. It is also seasonally affected as the theatres during the summer, and at Easter and Christmas, increase the number of shows per day. This results in more relief work being available, as in accordance with the union's constitution, the regular projectionist cannot work more than 44 hours a week. There are three separate relief lists. The "A" list consists of projectionists who are without a steady job and these members are given preference in the assignment of relief work. The "B" and "C" lists contain the names of members who are available for work on a more limited basis. An assignment lasting more than three months in duration is considered permanent relief work. The union has established procedures for the assignment of this type of work similar to the procedures used to fill steady jobs.

15. Normally working in a steady job entails working in one theatre. However, a unique form of steady work called "swing" work also exists. Swing operators work steady hours in one or more theatres. For example, ten or more regular hours may be available at each of the two theatres. These hours would be combined to form a swing job and the person who got that job would work regularly in the two theatres. Thus if the union feels there should be three steady jobs created out of the hours available at two theatres, they would create a swing job. The union has not created any new swing jobs recently. In the event that half of the swing job disappears, for example, if one of the theatres closed, the swing operator is entitled to keep working the remaining half of the job if he/she so chooses.

16. Whenever a new theatre opens the union decides, based on the number of hours and the hourly rate, how many new steady jobs to create. The Executive Board of the union arrives at a decision and then this decision is taken to a general membership meeting. The general membership then votes to accept or reject the Executive Board's recommendations.

17. Mr. Galiatsos has been working with Local 173 since 1965 and has been a regular member since 1977. Mr. Galiatsos worked as a relief projectionist until he had sufficient seniority to successfully bid on a permanent or steady job. In January, 1986 he obtained a steady job at the Uptown Backstage Theatre. This job guaranteed him regular hours and pay, at a specific theatre. Mr. Galiatsos was the only steady projectionist at the Uptown. In September, 1988 a steady job became available at the Cumberland Cinema. The Cumberland had originally provided sufficient work to enable the union to create five steady jobs. Due to automation and other factors, over time the union reduced the permanent steady work to three positions. It was the third position which was available in September, 1988. For historical reasons and depending on the number of screens in a given theatre, there is considerable variation in the hourly rate paid to the projectionists at various theatres. The Cumberland is a theatre with a high hourly rate. Projectionists working fewer hours at the Cumberland can make as much or more than projectionists working more hours at a single screen cinema. For this reason, the Cumberland is a desirable place to work.

18. Before going into the process the complainant went through to obtain this position, it is appropriate to set out some of the relevant portions of the union's Constitution and By-Laws. They read as follows:



**Constitution****Article VII****Duties of Officers****Section 5. BUSINESS MANAGER**

It shall be the duty of the Business Manager to investigate any trouble, or complaint, that may arise and affect a settlement, if possible, in an amicable and beneficial way to the Local. If he/she fails to do so, he/she must report the case to the Executive Board.

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**Section 7. EXECUTIVE BOARD**

The Executive Board shall investigate all complaints of Members and decide, if possible, upon all questions in dispute between Employer and Employee, accepting any honourable means toward an amicable settlement that may be deemed essential to the best interests of this organization.

They shall decide on all matters referred to them by the Membership and their decision shall be binding, unless reversed by the Membership by majority vote of the Members present at a Regular, or Special Meeting of the Local.

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**Article XVII****SENIORITY AND FILLING JOBS**

**Section 1.** All steady jobs shall be the property of this Union. Any job to be filled by this Local shall be in order of seniority at a Membership meeting, excepting where the Local's Constitution and By-Laws expressly state otherwise.

Projectionist 11 positions shall be exempt from this article.

Seniority of Members shall be governed by the length of continuous membership in Local 173.

Any Member may hold only one job in the jurisdiction of this Local. However, Members may hold elective or appointed positions in addition to their steady jobs.

**Section 2.** Upon the death of a Member of the Union no application or discussion re the vacancy created shall be permitted for a period of seven (7) days.

Any job openings shall be posted for seven (7) days before they are filled.

Only those Members in good standing shall be allowed to apply for any open job.

**Section 3. BOOTH SENIORITY**

In case of a reduction of workforce in any Theatre whatsoever, booth seniority shall prevail and the projectionist with the longest continuous booth seniority shall remain on the job.

Booth seniority shall commence when the Member takes the job on the floor.

Booth seniority shall prevail in the separate booths, distinguished by the Collective Agreements that are housed in the same building.

In the case of automated Theatres, a dual or triple etc., shall be considered as one booth.

In case of a Theatre closing for repairs, or alterations, the regular Projectionist(s) on the job shall have the privilege of returning to the job, if and when the job re-opens, providing said Member has not used his/her seniority to acquire another job.

If a Theatre changes policy the Projectionist(s) who leave(s) the job shall be entitled to the job should the Theatre revert back to its "original policy" providing the Member has not used his/her seniority to acquire another job. This privilege shall cease after one (1) year.

## BY-LAWS

### ARTICLE VI

#### FILLING JOBS

##### Section 1. MANDATORY FOR ONE YEAR

When a position as a Projectionist has been filled on the floor and the member has voiced, or written, his approval of acceptance, the move becomes mandatory and cannot be changed. The member must remain in the position for a period of one (1) year, commencing from the date the job was taken on the floor. Failing to do so the member shall lose his seniority standing for that year, or period thereof, unless however the position closes.

• • •

##### Section 3. PERMANENT RELIEF JOBS

All jobs, other than steady jobs, shall be filled by the Business Manager, unless classified by the Executive Board and approved by the Floor as permanent relief jobs, which shall be filled by seniority rules but with no successor rights. Where a relief job lasts more than three (3) months, the job shall be filled as a permanent relief job by seniority rules without successor rights.

All permanent relief jobs shall be filled on the floor, by seniority rules without successor rights, after all regular steady jobs have been filled.

• • •

## Article VII

##### Section 1. WORKING HOURS AND RELIEF CALL

A regular projectionist or relief person, shall work only Forty-Four (44) hours in a one (1) week period at any one (1) job.

The minimum call for a relief person shall be four (4) hours, or one (1) shift.

Regular or Relief person shall not book off later than 7:00 p.m.

• • •

19. As noted, the job available at the Cumberland was the third steady position. If a reduction in the number of steady positions was necessary, Booth seniority would apply and the third position would be eliminated. Booth seniority is analogous to "departmental" seniority in an industrial establishment. It is utilized as the primary factor in determining the order in which projectionists at a given theatre will be removed. However, in the filling of steady jobs, a member's seniority within Local 173 is the relevant factor not Booth seniority.

20. Mr. Galiatsos testified that prior to applying for the position he did some research into the positions at the Cumberland. It is the job of the recording-secretary of the union to take minutes of Executive Board meetings and general membership meetings. In the course of his

research, Mr. Galiatsos was able to obtain a copy of the minutes from a general membership meeting held in October, 1983. At that meeting the third steady job at the Cumberland was awarded to Mr. Tom Choi. When a job is awarded, it is normally subject to various conditions and these are outlined to the member before he/she accepts the job. The relevant portions of the October, 1983 Minutes read as follows:

*CUMBERLAND 4 Plex. 3rd STEADY MAN 20 hrs. per week.*

This job will last as long as the Theatres [sic] open in the afternoons.

Brother *Tom Choi* took the job on seniority. The chair asked 3 times if further applications were being made.

• • •

*Market Square CinePlex - 2nd Job.* If no matineés are run, there is no 2nd job.

• • •

Mr. Galiatsos testified that he interpreted these minutes to mean that if he got the third steady job at the Cumberland, as long as a single matinee 2i was regularly scheduled, the third steady projectionist position would continue to exist.

21. As in any industry, there is a certain amount of jargon, or language peculiar to that industry. For example, a theatre is operating continuously, or as a “grind”, when it is open from approximately noon to midnight seven days a week. Normally the theatre would run two matineés and two evening shows when it is operating continuously. There was some discrepancy between the witnesses called by the union and those called by the complainant concerning the meaning of the term “night house”, as applied to the hours of operation of a theatre. Mr. Harris in his testimony defined a night house as a theatre that runs Monday to Friday evenings only and runs matineés in addition to the evening shows on Saturday and Sunday. The theatre is generally open from approximately 7:00 p.m. to 11:30 p.m. during the week and 12:00 p.m. to 12:00 a.m. on Saturday and Sunday. Mr. Harris testified that he had never heard of the situation where only one of the two matineés were eliminated, being referred to as a night house. Mr. Hulse on behalf of the union defined a night house as including the situation when a theatre runs the first matinee, eliminates the second one and re-opens at 7:00 p.m.

22. On September 6, 1988 Mr. Galiatsos attended the regular membership meeting and was successful in obtaining the third position at the Cumberland. He testified that he understood that the same conditions applied as in 1983, namely as long as the theatre was open in the afternoon and ran even one matinee 2i he would retain his steady position. At the time he obtained the position in 1988, the Cumberland was running continuously. Mr. Hulse disagreed with Mr. Galiatsos. Mr. Hulse testified that Mr. Galiatsos was awarded the third job subject to the condition that the Cumberland continued to operate seventy hours a week or on a continuous basis. If one of the matineés was eliminated thereby making the Cumberland a night house (by the union’s definition), the third position would be eliminated and Mr. Galiatsos would be out of a steady job. The minutes from this meeting were filed with the Board. The relevant portion is brief and simply says:

*“Cumberland (3rd job) Brother P. Galiatsos Feb. ’77 took this job on seniority and verbally accepted”*

At the time of this meeting, Mr. Adams was the recording secretary. He testified that the conditions of the job were verbally outlined to Mr. Galiatsos. However, in response to a question from the chair he indicated “I can’t swear that this [the event that would trigger the elimination of the



3rd steady job] was clarified at the meeting but I think that it was". Given the tendency of Mr. Galiatsos towards selective hearing, Mr. Hulse's unreliability as a witness and Mr. Adams honest uncertainty, exactly what did take place at the meeting remains extremely unclear.

23. From September, 1988 to March 1991 Mr. Galiatsos worked at the Cumberland Theatre as the 3rd steady projectionist. Mr. Tsiobanos held the first steady position, and Mr. Tom Choi held the 2nd position. The three men split the seventy regular hours available equally. Each worked twenty-three and one third hours per week on a regular basis plus split any additional hours which arose due to screenings, service and repair and make-ups. In March, 1991 the company announced that it would be eliminating one matinee 2i at the Cumberland, reducing the available regular hours to sixty per week effective March 25, 1991.

24. Mr. Harris testified that he telephoned Mr. Hulse and notified him of the change in hours. He thought that he did this approximately two weeks prior to March 25, 1991. Based on written correspondence filed with the Board it appears that this conversation took place on March 18, 1991. Although Mr. Galiatsos found out about the reduction in hours at approximately the same time from a different source, it appears that he did not immediately understand the effect this would have on his job. Mr. Hulse telephoned Mr. Galiatsos on March 21 and told him that as the Cumberland was no longer operating on a continuous basis that his job had been eliminated. Naturally based on his understanding of the basis upon which he took the job, Mr. Galiatsos did not agree that he should be removed and indicated that he wished to take his case before the Executive Board and if necessary the general membership. Mr. Hulse indicated that if Mr. Tsiobanos and Mr. Choi were willing to split the available hours with him that he could remain on the job till the decision was finalized. Mr. Tsiobanos and Mr. Choi were not willing to split the remaining hours, therefore as of March 25, 1991 Mr. Galiatsos position was eliminated and Mr. Tsiobanos and Mr. Choi each started working thirty regular hours per week.

25. In Mr. Galiatsos' cross examination of Mr. Hulse, the following sequence of questions and answers took place.

Q. Mr. Harris stated that he had a conversation with you approximately ten days before the 18th [of March]?

A. He could have.

Q. I'm concerned whether there was a conversation before the 18th?

A. There could have been.

Q. That would bring us back to March 10. Between then and March 21 when you informed me by telephone that I would be removed did you make any effort to let me know?

A. Mr. Choi said you already knew.

Q. But you didn't contact me?

A. I probably tried and got a hold of you as soon as I could.

Mr. Harris *did not* testify that he had a conversation with Mr. Hulse approximately 10 days before the 18th of March. Mr. Harris testified that he spoke to Mr. Hulse approximately two weeks before March 25. This conversation was clarified (before the sequence set out above took place) to have taken place on March 18, one week before March 25th. However, that is not the way Mr. Galiatsos heard the evidence. In his mind Mr. Hulse had waited eleven days to call him to advise

him of the reduction in hours. In fact, Mr. Hulse contacted him three days after the telephone call from Mr. Harris. This perception of delay and mistreatment appears to have increased Mr. Galiatsos' negative feelings towards the union. Mr. Galiatsos, albeit it appears to be unconsciously, in many instances appears to perceive that union officials are treating him unfairly, when there is no basis in reality for this perception.

26. According to the union's constitution, the Executive Board is made up of the president, vice-president, secretary-treasurer, recording secretary, business manager, assistant business manager and one Executive Board member. All of these positions are elected positions within the union. On March 27, 1991 Mr. Galiatsos appeared before the Executive Board to appeal Mr. Hulse's decision to remove him from the Cumberland. The portion of the minutes from this meeting referring to Mr. Galiatsos read as follows:

Brother Galiatsos appeared because he believes he should remain employed at the Cumberland even though the theatre has been reduced to a night house. However, the union decision is that only 2 people should work the theatre while it is a night house. Peter has also requested that 2 weeks notice be paid and the union will see to it.

Mr. Hulse testified that before the Executive Board, Mr. Galiatsos took the position that the other two members should split the remaining hours at the Cumberland with him. Mr. Galiatsos also indicated that he felt it was unfair that the remaining two projectionists got extra hours as a result of his job loss. The Executive Board disagreed with this and unanimously decided that the two senior people should split the job. Mr. Hulse indicated that they felt that there was insufficient work to justify three steady projectionists. However, had the two senior men been willing to split the remaining hours with Mr. Galiatsos, the Executive Board would have accepted this result subject to its approval by the general membership.

27. The Cumberland theatre was not the only theatre where hours were reduced effective March 25, 1991 and a projectionist removed. Two other theatres, the Sheraton Centre and the Hollywood, were also affected in exactly the same way. The junior projectionist at the Hollywood, (there were only 2 projectionist at the Hollywood) Mr. Hunt, testified before the Board. His evidence is of little assistance to the resolution of Mr. Galiatsos' complaint. It appears however, that the circumstances at the Hollywood were different from those at the Cumberland and the senior projectionist, who was ill, agreed to split the reduced hours with Mr. Hunt. This arrangement was approved by the Executive Board subject to ratification by the general membership. Evidence concerning the situation at the Sheraton Centre theatre was not relevant to Mr. Galiatsos' complaint.

28. There was a general membership meeting on April 2, 1991. The first page of the minutes read as follows:

The minutes of the March, 1991 were read & approved

Vote Voice Carried

Notices of motion

Notice of motion re: Constitution and Fines as submitted by the Executive Board

Received the 2nd of 3 readings

Previous Notice

Article II Remove Paragraphs I, 2 & 3 and replace with Health & Welfare benefits shall be those as outlined in local 1735 group benefit & pension plan booklets'

Vote Voice Carried

#### **Executive Board Report**

Brother P. Galiatsos

Brother Galiatsos asked that he remain employed at the Cumberland even though it has been reduced to a night house. However, the union decision is that only 2 people should work the theatre while it a night house. Brother Galiatsos has asked to record that bumping isn't a Local 173 policy.

Information

Weeks Increase

1st weeks increases are now due from the Famous Players & Festival Theatre projectionists

Brother Beattie has challenged the amount he is to pay, but the exec. board is upholding the by-laws & is expecting Brother Beattie to pay the calculated increase.

Information

Sheraton / Hollywood / Cumberland

Famous Players has reduced these 3 theatres to a night house policy. It's the executive recommendation that the voluntary agreement between Brothers Hunt & Shapiro to equally split the hours be approved ...

Vote Voice Defeated

Brother Hunt will be removed from the theatre as of Tuesday April 2, 1991

...

29. Mr. Galiatsos testified that when the portion of the Executive Board report pertaining to himself was read, he made a short appeal to the membership indicating that it was immoral and unfair to remove him from a steady job in a recession when jobs were scarce. The president then ruled that that portion of the Executive Board report was for information only and would not be put to a vote. The evidence of Mr. Hulse confirms this. Mr. Galiatsos testified that when the arrangement between Mr. Hunt and the senior projectionist at the Hollywood was put to the membership it resulted in a heated discussion. Mr. Hulse spoke in favour of the arrangement while other members felt it was unfair and discriminatory to allow Mr. Hunt to remain while removing Mr. Galiatsos and spoke against it. At this point Mr. Galiatsos left the meeting. In his evidence, Mr. Hulse agreed that there was no vote specifically on Mr. Galiatsos' case and that the situation was put to the membership for information only. The vote that took place dealt with what should happen at all three cinemas. As the minutes point out, the motion that Mr. Hunt be allowed to remain at the Hollywood was defeated in the vote.

30. Mr. Hulse testified that had Mr. Galiatsos remained at the meeting he could have requested a vote specifically on his situation under new business at the end of the meeting. Mr. Galiatsos testified that he understood his situation was presented for information only, and that that was the end of it. He did not get the vote he felt he was entitled to, therefore he left the meeting. There is no dispute of any significance between the parties as to what took place at the April 2 membership meeting. However, the parties have placed different interpretations on these events and hold widely divergent perceptions of the events. The union feels Mr. Galiatsos was treated fairly and in accordance with past practice. Mr. Galiatsos disagrees.



31. The evidence is not clear when, but at some point Mr. Galiatsos indicated to the union that he was willing to work the remaining hours after the ten hours attributed to the elimination of one matinee if two were deducted. He was no longer requesting an even split of the sixty available hours amongst the three projectionists but was willing to have the senior men work 23.3 hours a week while he worked 13.3 hours. Mr. Hulse conceded that this arrangement could have been raised by Mr. Galiatsos at the general membership meeting. This arrangement was not acceptable to the union for reasons I will outline below. Mr. Galiatsos filed the complaint before me on April 6, 1991. Since his removal from the Cumberland he has been performing relief work.

32. Mr. Hulse and Mr. Adams testified that in accordance with the union's constitution, Article XVII, when a theatre changes policy the junior projectionist will be removed subject to the approval of the membership. A change of policy refers to a change in hours of operation in a theatre. The exact wording in the constitution is "in case of a reduction of workforce in any Theatre whatsoever, booth seniority shall prevail and the projectionist with the longest continuous booth seniority shall remain on the job". The union appears to interpret this wording as requiring the removal of a projectionist whenever hours are reduced at a theatre. The evidence of Mr. Adams and Mr. Hulse indicated that in determining whether or not to eliminate a steady job the other major factor considered by the business representative and executive committee is whether or not the job(s) provide a livable wage for the steady projectionist(s). Both Mr. Hulse and Mr. Adams testified that when the Cumberland ceased to operate on a continuous basis the third position was eliminated in accordance with these union practices or policies. These policies are not written down nor are they to be found encapsulated in minutes from either Executive Board meetings or general membership meetings. Mr. Hulse and Mr. Adams testified that they are common knowledge. Mr. Galiatsos disagrees with this.

33. Mr. Adams testified that the union has recently spent some time considering issues of job restructuring. In 1988-89 the union set up a special committee, the job restructuring committee, to inquire into the hours of work and incomes of projectionists to determine whether members were making a livable wage and to determine if the number of steady jobs should be reduced. The report of this committee primarily deals with specific situations and was approved at a general membership meeting. The report also appears to have generated discussion within the union at a more philosophical level. Mr. Adams, who was on the Committee, testified that the union has made efforts to eliminate "part-time" assignments (the term part-time was never defined) and to encourage a "full-time" commitment from its members. He indicated his belief that there is enough relief work available to support full-time relief projectionists and that the union operates more efficiently if members are regularly available to take relief assignments. Mr. Adams indicated that the union is currently encouraging a stronger commitment to the craft to ensure better service to the employers. He testified that the union gets less service, commitment and quality of work from part-time members.

34. With regard to the specific situation at the Cumberland Mr. Adams testified that the union was concerned that if the three projectionists split the remaining hours the union would be creating three part-time positions. The union decided therefore that it was better to have two full-time steady projectionists and one full-time relief projectionist. The same logic was utilized to resist Mr. Galiatsos' suggestion that he absorb the impact of the reduced hours and continue to work 13.3 hours a week. Mr. Adams testified that the trend is to increase the hours and enhance full-time jobs.

35. Mr. Hulse testified that he could not recall specifically when Mr. Galiatsos first raised his request to be allowed to remain at the Cumberland and work the hours available after Mr. Tsiobanos and Mr. Choi had worked their 23.3 hours. Mr. Hulse testified that in the circumstances at

the Cumberland he felt that Mr. Choi and Mr. Tsiobanos had the right to work the remaining hours. In addition he indicated that it was the union's policy to disallow part-time work thereby ensuring that people made a decent livelihood.

36. I heard a great deal of evidence concerning the union's past practice in assessing, in a given situation, whether a steady job should or should not be eliminated and a projectionist removed. Some of the situations were similar to that of Mr. Galiatsos and some were quite different. I have carefully reviewed the evidence given by the witnesses with regard to the past practice of the union and do not find it particularly helpful.

37. At the general membership meeting on April 2, 1991 Mr. Galiatsos raised the issue of "bumping" within the union. It was his position that he should be able to bump any projectionist with less seniority than he, who was holding a steady position. Mr. Galiatsos quoted as justification for his position a letter dated April 6, 1977 which is attached to the collective agreement as Appendix "B". That letter makes a passing reference to bumping within the union, however Mr. Hulse on behalf of the union testified that bumping had never been allowed in Local 173 and that it was against the rules. He indicated that the letter set out in Appendix "B" is attached to the collective agreement because it sets out the policy agreed to by the union and the company concerning holiday pay. He was not sure whether bumping was allowed in Local 173's sister local in Ottawa but he was adamant that it never occurred within Local 173. Mr. Galiatsos did not give any examples of bumping having occurred within Local 173. He did not therefore contend that the union had treated him differently or discriminated against him when it refused to allow him to "bump" anyone. It appears to me that in raising this issue he is asking me to interpret Appendix "B" to the collective agreement and apply it to his situation. I am not prepared to do that, as in the context of this case, it is clear that the union did not violate the Act in interpreting Appendix B in the manner in which it did. There is no question that in refusing to allow Mr. Galiatsos to bump someone the union was acting in accordance with its past practice and did not in any way violate section 69 or 70 of the Act.

### Argument

38. In final argument Mr. Galiatsos took the position that the union violated his rights in its administration of the hiring hall rules and procedure and acted in a way that was arbitrary, discriminatory and in bad faith contrary to section 70 of the Act. He argued that he was unfairly removed from his job and that the hiring hall rules had been administered on a day to day basis without regard to consistency or guiding principles. He argued that the union has abused its powers and prerequisites and were motivated by whim, nepotism, prejudice, irrationality and favouritism. He alleged that due to personal animosity towards him, the Executive Board eliminated his job. He argued that Mr. Choi and Mr. Tsiobanos were motivated by self interest and the decision on whether or not to share the remaining hours should not have been left to them.

39. Mr. Galiatsos urged the Board to find that he had been deprived his right to utilize the union's democratic processes in that his situation was never put to a vote of the general membership. He argued that the elimination of a single matine 2i should not have triggered his removal as it was contrary to his understanding of the conditions upon which he took the job. Mr. Galiatsos submitted that the policies and procedures put forward by the union to justify the elimination of the third steady position at the Cumberland are not known to the general membership and have never been debated, voted on and agreed to by the membership. The union in his contention, is merely utilizing them at this stage to justify their inappropriate conduct. Mr. Galiatsos requested that the Board direct the union to provide clear rules to the membership so they can make informed decisions on matters which affect their future. Mr. Galiatsos provided the Board with



copies of *Bernard Dorais*, [1985] OLRB Rep. Mar. 408, *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35, *John Bellenger*, [1984] OLRB Rep. Aug. 1039, *Joe Portiss*, [1983] OLRB Rep. July 1160 and *Susan G. Bartlett*, [1983] OLRB Rep. Dec. 2067, in support of his submissions.

40. By way of relief Mr. Galiatsos requested that the Board direct that he be returned to the Cumberland and either share equally in the available hours or be given his fair share of hours. He requested to be allowed to remain in the job until he was able to bid for and obtain a steady job at a different location. In the alternative, he indicated that he would be willing to accept the 13.3 remaining hours of work in a fair system. By a fair system he was referring to the manner in which the hours were allocated amongst the three projectionists. For example, he wanted some say in the days of the week he worked. In the final alternative, he requested that the Board direct the union to provide him with the opportunity to present these options to the general membership and allow them to either ratify or disallow his return to the Cumberland.

41. Counsel for the union argued that one of the most difficult tasks facing a union is to allocate reduced work. He argued that there is often no right answer and that the test pursuant to section 70 was not whether the Board agreed with the way the decision was made. The test in his submission was whether the union acted in a manner that was discriminatory, arbitrary or in bad faith. Was there a valid reason for what was done and could the decision be rationally supported? In counsel's submission this was the question the Board had to answer, not whether the union's decision was right or wrong. Counsel took the position that there was no basis for a finding of arbitrariness on the part of the union. The union turned its mind to the issue and debated the situation at the Executive Board level and at a general membership meeting. A vote was held, with regard to the three theatres effected, but Mr. Galiatsos walked out before it was concluded. Had Mr. Galiatsos stayed he could have had an opportunity to put his case to the general membership at the end of the meeting under new business. Because Mr. Galiatsos left when he did he forfeited this opportunity. Counsel asserted that Mr. Galiatsos used many adjectives to described the factors influencing the union's decision such as nepotism, whim, animosity and hostility but that these allegations are not supported by the evidence.

42. Counsel for the union argued that in reaching the decision it did the union said it was not prepared to allow "half" jobs because they are contrary to the objective of ensuring full-time job security. He indicated that if Mr. Galiatsos only worked 13.3 hours per week at the Cumberland, he would want to supplement his hours with some relief work. This would be unfair to the other relief projectionists who had no guaranteed hours. In the end if part-time work was allowed the membership would be watered down to a lot of people with part-time work. They would not be committed to the craft. Counsel stressed that the union has an obligation to balance quantity and quality of jobs. Counsel urged the Board to weigh the interest of Mr. Galiatsos against the interest of the union and other members of the union. He asserted that there was a rational basis for the decision that was made.

43. Counsel reviewed the portions of the union's By-Laws and Constitution and argued that although they were not determinative of this situation one way or the other, they showed that the membership had turned its mind to the issue. In this case he argued that the Executive Board had made a decision and that this decision was put to the membership. After a debate, the membership voted on what was to be done at all three theatres with the result that the junior man was to be removed at all three theatres.

44. In response to Mr. Galiatsos' submissions, Counsel for the union argued that the decision to eliminate the third steady projectionists job at the Cumberland was not made by Mr. Tsio-banos and Mr. Choi as alleged by Mr. Galiatsos. That decision was made by the membership.



Counsel also took the position that the rules and by-laws concerning job assignments could not be drafted to the degree of explicitly that Mr. Galiatsos asked for. Counsel argued that the membership understood what the rules were. In summary, counsel for the union argued that the union had not violated the Act and asked that the complaint be dismissed. In support of his submissions counsel for the union also referred the Board to *Dufferin Aggregates, supra*, *Bernard Dorais, supra*, and *John Bellenger, supra*. In addition counsel also referred the Board to *Maurice Berlinguette*, [1986] OLRB Rep. Feb. 194 and *Donald Vasseur*, [1985] OLRB Rep. April 615.

45. In reply Mr. Galiatsos suggested that counsel for the union was trying to twist what had occurred at the general membership meeting on April 2, 1992. Mr. Galiatsos argued that he tried to appeal the Executive Board's decision but was refused a vote as the matter was for information only. He contends that is why he walked out of the meeting. Had a vote taken place on his specific situation and request Mr. Galiatsos made it clear that he would have accepted the result.

### Decision

46. Mr. Galiatsos is married to Mrs. Kitson-Galiatsos who is employed by the intervener as the District Manager for the Metropolitan Toronto Vicinity. She supervises fifteen theatres and reports to Mr. Harris. Mr. Galiatsos feels that the union discriminates against him because of his wife's position. I heard absolutely no evidence to justify this perception and find it totally without merit. There is no factual basis to support any allegations of discriminatory conduct towards Mr. Galiatsos by the union because his wife is a member of management. This allegation is therefore dismissed.

47. Mr. Tsiobanos and Mr. Galiatsos were at one point in time good friends. They are not now. At some point in the relatively distant past, Mr. Hulse acted as a witness in the marriage of Mr. Tsiobanos. The wedding took place at Old City Hall and at the time Mr. Hulse was working in a nearby theatre. This proximity was the basis for Mr. Tsiobanos's request, on the day of the wedding, that Mr. Hulse act as a witness. Somehow over the years the story changed and evolved into one that had Mr. Hulse acting as Mr. Tsiobanos's best man. Mr. Galiatsos asked Mr. Tsiobanos in cross examination the question "Do you recall telling me Mr. Hulse was your best man" and Mr. Tsiobanos responded "I never told you that, you've mentioned it to me and I never bothered explaining it". A less than honest approach to the issue on the part of Mr. Tsiobanos. Mr. Galiatsos in his complaint accuses Mr. Hulse of discriminating against him, in situations involving Mr. Tsiobanos, due to this apparent long time friendship between Mr. Hulse and Mr. Tsiobanos. Mr. Hulse vociferously denied this accusation and based on the evidence before me, I agree. Once again Mr. Galiatsos has seen conspiracies that simply do not exist. Albeit in this instance Mr. Tsiobanos did not help matters by allowing Mr. Galiatsos to continue in his mistaken belief. The allegations of discrimination by the union on this basis are therefore dismissed.

48. The conduct of the union in this case does not support a finding that a violation of section 69 of the Act has occurred. Section 69 of the Act regulates the manner in which a union represents its membership vis a vis the employer. The duty of fair representation under section 69 arises from the union's role as exclusive bargaining agent for its members. Section 69 ensures that the union does not misuse that authority in dealings with the employer. On the facts of this case it is clear that the employer did not make the decision to remove Mr. Galiatsos from the Cumberland. That decision was made by the union pursuant to its authority to run the hiring hall. Therefore, section 69 is not applicable to the situation before me and the allegations that the union has violated section 69 are dismissed.

49. Counsel for the union in final argument indicated that the evidence before me did not support Mr. Galiatsos' contention that the union's decision making was motivated by bad faith or

discriminatory intent. I agree. It is clear to me that Mr. Galiatsos genuinely feels discriminated against. However, the evidence does not in any way lend itself to such a finding. The union officials who testified before me were at times obviously frustrated with Mr. Galiatsos' tendency to selective hearing, but I cannot conclude that they bore him any ill will. Neither the union nor its officials have acted in a manner that is discriminatory or in bad faith contrary to section 70 of the Act.

50. The decision made by the union to remove the complainant as third projectionist was made in circumstances for which there is no governing article in the union's Constitution or By-Laws. Article XVII, section 3 of the union's Constitution outlines that Booth seniority shall apply in the case of the reduction of the workforce in a theatre. It does not outline what triggers the reduction of the workforce in a theatre. It deals with who shall be removed once the decision to reduce the workforce has been made. As counsel for the union pointed out, the Constitution and By-Laws are not determinative of the situation which occurred at the Cumberland in March of 1991. They are not the primary basis upon which the decision to eliminate the third projectionist's job was made. There is no allegation by the complainant that the union acted contrary to its By-Laws and Constitution in removing him from the Cumberland.

51. Mr. Galiatsos obtained the position at the Cumberland in October, 1988. Had better minutes been kept of the conditions governing the job, this case might have been avoided. This was acknowledged by Mr. Adams and I urge the union to adopt a process which ensures that more thorough and complete records are kept of the basis upon which steady jobs are awarded to union members. Mr. Galiatsos feels he took the job based on certain conditions and the union has a different perception of those conditions.

52. I have determined that the union did not act in a manner that was discriminatory or in bad faith when it made the decision to eliminate the third steady projectionists position and remove Mr. Galiatsos from the Cumberland. However, did they act in a manner which was arbitrary? Having thoroughly reviewed the evidence before me on this issue, regardless of the basis upon which Mr. Galiatsos originally took the job, I have great difficulty with the union's reasons for removing Mr. Galiatsos from the Cumberland theatre.

53. Counsel for the union argued that the decision of the business representative and the Executive Board was based on valid reasons and was rationally supportable. I heard a great deal of evidence concerning the policies and practices of the union which purported to establish the rights of Mr. Tsiobanos and Mr. Choi to Mr. Galiatsos hours, the circumstances which trigger the removal of the junior projectionist from a theatre, and the philosophical approach to job restructuring taken by the union to ensure that their members earn a livable wage and feel a full time commitment to the union. But none of these policies and practices are written down. In an organization where major decisions appear to be made by the general membership none of these policies (other than the specific situations dealt with by the report of the job restructuring committee) appear to have been put to and endorsed by the membership. The evidence of past practice put before me concerning the manner in which a reduction in hours was dealt with in other theatres is quite ambiguous. On some occasions jobs were reduced through attrition or displaced members were placed in other steady positions and in other cases swing jobs were created. The business representative has a wide latitude in the manner in which he decides questions of his nature. The union had reasons for the decisions it made but a consistent policy is difficult to ascertain. This apparent lack of consistency in a matter which goes to the very heart of the union's obligation to administer the hiring hall in a fair manner, gives me some concern. I can certainly understand why Mr. Galiatsos was confused. However, a check on the discretion of the business representative exists as it is possible to appeal his/her decision to the general membership. Due to the conclusions



I reach concerning that process, it is therefore not necessary for me to decide whether the decision of the business representative and the executive committee to remove Mr. Galiatsos was made in an arbitrary fashion and I decline to do so.

54. There was no evidence put before me which establishes that “part-time” projectionists are less committed to the job than “full-time” projectionists. Particularly in the case of the complainant, I have no evidence that he would be less committed were his hours to drop from 23.3 hours per week to 20 hours per week or from 23.3 hours per week to 13.3 hours per week. While this philosophy has some appeal, I heard no evidence that in specific situations employers received inferior quality service from part-time projectionists. No reasons were advanced as to why this conclusion had been reached. Counsel for the union alleged that Mr. Galiatsos would not be satisfied working 13.3 hours a week and would want to be assigned relief work. Mr. Galiatsos asserts this is not true and I have no reason to disbelieve him.

55. While it is certainly not necessary for a union to have written rules and procedures concerning the operation of the hiring hall, I would encourage the union in this case to outline the policies which govern the decision making of the executive on questions such as the one before me, and to distribute this to the membership. Also, if it is not doing so already, the union should consider providing its members with a copy of the current union Constitution and By-Laws as well as the collective agreement. These actions in conjunction with clearer more complete minutes establishing the conditions upon which steady positions are offered and filled, should go a long way towards eliminating the apparent breakdown in communication which occurred in the situation before me.

56. I also have great difficulty with the process followed at the union’s general membership meeting on April 2, 1991. The processes followed at a union’s membership meeting would normally be considered to be internal union matters and therefore the Board would choose not to interfere. In the case before me, Mr. Galiatsos asserted that he had a right to take his case concerning his removal from the Cumberland, to the general membership, for a final decision. This was not disputed by the union. The membership therefore, in some circumstances, takes a direct role in the operation of the union’s hiring hall procedures. That body has the authority to confirm or reject the decisions made on a daily basis by the business representative. The general membership has the right to determine union policy and to deal with specific situations concerning manpower in a given theatre. Mr. Hulse and Mr. Adams in their evidence made numerous references to decisions that “would be taken to the membership to vote on”. Therefore given the scope of the union membership’s authority it is appropriate to review this process pursuant to section 70 of the Act.

57. The minutes of the April 2nd meeting clearly indicate that Mr. Galiatsos requested to be allowed to remain at the Cumberland but that the decision of the business representative, confirmed by the Executive Board, that he be removed from the Cumberland was put to the membership for information only. Why, when it was so clear that Mr. Galiatsos wanted an opportunity to address the membership, make a plea for his case, and have the membership vote and decide his fate did the union not give him that opportunity? It is very self serving to say that Mr. Galiatsos could have raised his request under new business at end of the meeting when clearly he had been led to believe that his case would not be discussed further. That is why he left the meeting. While I agree that the situation at all three theatres was voted on, this vote was on a question different than that which Mr. Galiatsos sought to raise. For example, he was never allowed to seek the approval of the general membership to remain at the Cumberland and work 13.3 hours a week.



58. As was pointed out by counsel for the union in *Dufferin Aggregates, supra*, the Board made the following observations:

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37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it -- rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

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59. The union, never put forward any justification, let alone an objective justification, as to why it put the Executive Board's decision concerning Mr. Galiatsos before the membership on April 2, 1991 on an "information" only basis. There was no dispute that the complainant had the right to refer the decision reached by the Executive Board to the membership and if he could obtain a vote in his favour, reverse that decision. I do not accept the union's reasoning that Mr. Galiatsos could have raised his request under new business had he not left the meeting. Given that his request had already been dealt with on an information only basis it does not make sense for him to try to raise it again. In refusing to allow the complainant to present his request to remain at the Cumberland to the membership for a vote, the union acted in an arbitrary manner contrary to section 70 of the Act.

60. In *Gerald Lecuyer*, [1985] OLRB Rep. July 1099 the Board outlined concerns that placing a matter before the membership for decision may not always ensure compliance with the Act. After observing that the Act was intended to protect minority interests from the tyranny of the majority the Board went on to say:

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62. Compliance with the duty of fair representation created by section 68 [now section 69] requires that heads be used and not merely counted. The group vote must satisfy the same test as any other form of decision-making: neither the substance of the decision nor the procedure taken to arrive at it may be arbitrary, discriminatory or in bad faith. (See *The Corporation of the Town of Oakville*, [1984] OLRB Rep. May 731 for an example of a membership vote found to violate section 68.) As with any other kind of decision, a decision taken by vote at a meeting of members can be no more reliable than the information on which it is based. ...

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61. The Board's objective in exercising its remedial discretion is to place the complainant, as far as is possible, in the same position he would have been in had the Act not been violated. Although considerable time has passed, I feel that it is still appropriate to provide Mr. Galiatsos with the opportunity to place his case before the membership for its decision. On numerous occasions during the hearing Mr. Galiatsos asserted that if he had been given a fair opportunity to put his case to the membership and have them vote on it he would have accepted the result. In final submissions he did not raise any concerns that to do so now would be problematic.

62. I therefore direct the Executive Board of the union to provide Mr. Galiatsos with the opportunity to put before the membership and have the membership vote on, the question as to whether he should have been entitled to remain at the Cumberland Theatre in March, 1991 on the basis that he share equally in the 60 available hours. If that arrangement is not acceptable to the membership then Mr. Galiatsos shall be given the opportunity to present to the membership for decision the arrangement whereby he will be entitled to remain at the Cumberland and work 13.3 hours a week (plus his share of any additional hours that arise).

63. To ensure that Mr. Galiatsos be given the fair opportunity to present his case all members of the union shall be notified in advance that the issue is to go before the membership. A copy of this decision is to be posted in the union's office and copies are to be provided by the union to those members who request it. Mr. Galiatsos is to be allowed a fair opportunity to put his case to the membership but it does not mean that he is entitled to any special treatment or that the members of the Executive Board cannot express their opinion. Should Mr. Galiatsos be successful in obtaining the necessary support from the membership to return to the Cumberland on a steady basis, he is not entitled to demand relief work to supplement his hours as if he were on the unions "A" list. This would be unfair to those members who do not have any steady hours and are dependent on relief work.

64. Until the results of the membership meeting are known it cannot be ascertained whether Mr. Galiatsos is entitled to any monetary relief. As the employer was in no way responsible for Mr. Galiatsos removal from the Cumberland, it cannot be held liable if Mr. Galiatsos is found to have suffered any monetary loss.

65. If the parties have any difficulty in implementing this award, I will remain seized with regard to the issue of relief.

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**2373-91-R; 2374-91-R Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Applicant v. R. R. Projects Inc., Golden Arm Flooring Inc., Respondents**

**Construction Industry - Damages - Related Employer - Remedies - Board declaring that respondent companies be treated as one employer for purposes of the Act and not limiting retrospective effect of the declaration - Board also directing that second respondent pay union the unsatisfied damages, if any, arising out of a damages award made 7 months earlier against first respondent by another panel of the Board in a section 126 proceeding**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

**DECISION OF THE BOARD; June 16, 1992**

1. For reasons given below, the names of the respondents in these applications have been amended to "R. R. Projects Inc. and Golden Arm Flooring Inc."

2. File No. 2373-91-R is an application made under subsection 1(4) of the *Labour Relations Act*. File No. 2374-91-R is an application made under section 64 [formerly section 63] of the Act. Both applications, as originally made, named as respondents R.R. Projects Inc.; Golden



Arms Construction; and, Randy's Floor and Windows Covering and Accessories. The applicant later requested that both applications be amended by adding Golden Arm Flooring Inc. as a respondent and by adding it to the request for relief in each application. During the course of the proceedings, Riad (Randy) Wehbe, who represented R.R. Projects Inc. at the hearing, admitted that Golden Arms Construction and Randy's Floor and Windows Covering and Accessories were unincorporated operating divisions of R.R. Projects Inc. and were bound together with it to the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America effective May 1, 1990 to April 30, 1992 ("the Agreement"). The applicant also is bound to the Agreement. Based on that undertaking and with the consent of the other parties, the applicant requested leave to withdraw the applications insofar as they related to the two divisions. Accordingly, the Board directed that the applications made under subsection 1(4) and section 64 of the Act be withdrawn insofar as they relate to Golden Arms Construction and Randy's Floor and Windows Covering and Accessories.

3. The applicant did not pursue in final argument the application for relief under section 64 of the Act and that application is dismissed. Accordingly, the remainder of this decision deals only with the application under subsection 1(4) of the Act.

4. For ease of reference, the Board will refer to the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America as "the applicant" or "Local 27"; to R.R. Projects Inc. as "Projects" and to Golden Arm Flooring Inc. as "Flooring".

5. Projects' business is the supply and installation of floor coverings. Randy Wehbe's wife Randa Wehbe is the sole shareholder and director of Projects, and its President. She prepares its payroll and does its bookkeeping. Randy Wehbe runs Projects' jobs. His employment with Projects provides his only source of income. He is not paid a salary. He draws whatever he needs and, since his wife is President, he feels free to take whatever draw he wants. Projects has been in the resilient flooring contracting business since the mid-1980's. Local 27 has been the exclusive bargaining agent for Projects' employees who install floor coverings since January 17, 1991.

6. Randa Wehbe's brother, Nick El-Eid, formed Flooring in June, 1991. It was incorporated June 13, 1991. Its objects include contracting for the supply and installation of resilient flooring in the industrial, commercial and institutional ("ICI") sector of the construction industry. El-Eid is Flooring's sole shareholder, director and officer. He keeps its books and records. He formed Flooring for the specific purpose of performing a flooring contract on Holy Angels Catholic School in Toronto for Bradscot Construction Limited. It was the first large job which El-Eid had bid and won. El-Eid had worked for Projects for approximately two and one-half years prior to forming Flooring. According to Randy Wehbe, everyone knew El-Eid as an employee of Projects. Wehbe also described their families as being very close; that is, El-Eid, his sister Randa Wehbe, their parents, Randy Wehbe and his family.

7. The developments leading to these applications began in August 1991. At that time, Projects had a contract from Bradscot, the general contractor on a project at Rosedale Heights Public School in Richmond Hill to supply and install floor covering. El-Eid was engaged by Bradscot to repair the cement finishing of the floors which were to be covered under Projects' contract. Bradscot supplied the materials and El-Eid supplied the labour and performed the work on a piece work basis. He had two employees working on the job besides working himself. While Projects was on the Rosedale project, Wehbe was advised by Torcom Construction that Projects was the successful bidder on a flooring project at St. Mary's Catholic School. Wehbe declined to have Projects enter into a contract with Torcom, citing financial problems. According to Wehbe, when



Torcom asked him to recommend someone else, for the job, it was natural that he should refer his "nearest relative", El-Eid. El-Eid negotiated a contract for Flooring with Torcom which Wehbe states was for a substantially lower price than Projects had bid. Wehbe testified also that, because of Projects' unspecified financial problems, he did not intend to have Projects' do anymore business after Rosedale Heights until the problems were resolved. In the meantime he would refer jobs to El-Eid and would continue to do so in the future if he considered a job to be too small or to have insufficient profit in it for Projects.

8. Flooring also had been the successful bidder to Bradscot for a job on the Holy Angels Catholic School in Etobicoke to install a terrazzo floor and vinyl tile flooring. El-Eid testified that he negotiated a contract for Flooring with Bradscot in the spring of 1991, although the Board notes that a formal contract bears the date October 29, 1991, by which time the job was completed or close to being completed. El-Eid was Flooring's only employee when the job was due to begin and needed employees for both school jobs. The terrazzo floor work was sub-contracted to another contractor and, in any event, is not at issue under the collective agreement to which Flooring would become bound were the application to succeed. El-Eid hired one employee for Flooring, then tried to borrow some of Projects' employees. He was unable to make a deal with them and ended up having Projects supply the additional labour. Flooring was to reimburse Projects for the wages and benefits which Projects paid to those employees. There was no written contract between Projects and Flooring concerning this arrangement.

9. Three of Projects' resilient floor installers worked under the arrangement on the two schools: Sean Reilly, Pompeo Leggieri and Ron Pieroni. Reilly and Leggieri testified in these proceedings. Wehbe sent Reilly and Leggieri to start the job at Holy Angels, then, after a couple of days, he sent them to St. Mary's with instructions to lay out the sheet vinyl and wait for him to bring a roller to the job. Wehbe came to the job with their pay cheques, bringing the roller and blue prints for the job as well. He told Leggieri to take some material and the roller from his car into the school, then Reilly and Wehbe reviewed the prints for the job. Wehbe also spoke to Torcom's superintendent about the cafeteria flooring and when it was to be installed. Reilly and Leggieri were told by Wehbe to return to Holy Angels when they had finished laying the sheet vinyl flooring. They did so the same day. After that, they transferred regularly between the two jobs for the next two weeks.

10. Wehbe was on the Holy Angels job twice while Reilly worked on it. He came once to pick up their time sheets and once to deliver their pay cheques. During the first visit Reilly observed Wehbe arguing about the terrazzo floor with Bradscot's superintendent and speaking to the persons doing the job. On his second visit, Wehbe came with El-Eid and brought some base cement needed for the job. Leggieri testified that he saw Wehbe on the job three times including the first day on the job.

11. Wehbe and his wife were out of Canada from September 15th until November 6th. Before Wehbe's departure, he had sent some of his employees who were working on St. Mary's School to complete some deficiencies on the Rosedale Heights School. He called them for that work as it arose. The rest of the time, as he put it during cross-examination, "they were free to work for Flooring on the St. Mary's job". He also left instructions with Reilly to complete other deficiencies while he was away as soon as the materials were available. El-Eid told Reilly during Wehbe's absence that Bradscot's superintendent was calling him all of the time and asking him when Projects' work on the Rosedale Heights job was going to be completed. Wehbe had arranged with El-Eid and another relative to watch for the delivery of the material and to advise Reilly. When the time came, El-Eid brought the materials to the St. Mary's job where Reilly was working, instructed him to go the next morning to the Rosedale Heights School, install the materials and

return to the St. Mary's job as soon as he was finished. Reilly returned to the St. Mary's job by noon the same day. He was on the Rosedale Heights job two other times as well. El-Eid stated that he had instructed Reilly to do the deficiency work on his own time.

12. Reilly believes that his pay for the half day on the Rosedale Heights job was included in his pay for the St. Mary's job. He was paid \$1100. for some other deficiency work on the Rosedale Heights job by a cheque from Flooring. El-Eid said that he chose to do that because the Wehbe's were out of the country and was reimbursed by Projects for the payment. Neither respondent produced any documentary evidence of reimbursement. El-Eid testified that Flooring reimbursed Projects in full for the cost of wages and benefits of Projects' employees who worked on the Holy Angels job for Flooring. Documentary evidence compiled by El-Eid shows that the wages and benefits paid to the three employees was substantially greater than \$6,000. However, documentary evidence of repayment accounts only for \$6,000, including \$2,000 paid by Flooring to Finer Craft, a creditor of Projects. For the same reason, he paid Projects' employees who were working on his St. Mary's School job with money orders purchased by Flooring, accompanied by a statement of deductions from Projects. El-Eid testified that he did it this way so that they would be paid and it did not matter to him whether he paid them directly or reimbursed Projects for their wages, as he had done on the Holy Angels School. The money order in exhibit for payment to Reilly for work performed on St. Mary's School is dated November 14th, more than one week after the Wehbe's had returned from their trip. El-Eid testified that Flooring reimbursed Projects in full for the cost of wages and benefits of Projects' employees who worked on the Holy Angels job for Flooring. Documentary evidence compiled by El-Eid shows that the wages and benefits paid to the three employees was substantially greater than \$6,000. However, documentary evidence of repayment accounts only for \$6,000, including \$2,000 paid by Flooring to Finer Craft, a creditor of Projects.

13. Reilly and two other employees working for Projects performed work at Wehbe's request on the Rosedale Heights job on terms different than those called for by the Agreement. When it was getting close to school opening, he asked them to work overtime, but at their normal rate of pay because he could not afford to pay the overtime rate. They agreed to do so, and did work on condition that no deductions be made from their pay. On another occasion, after Reilly had been laid off following completion of the St. Mary's school job, at Wehbe's request, he agreed to complete some unfinished work for cash payment on the Rosedale Heights school job.

14. Wehbe and El-Eid both testified that a resilient flooring contractor needed very little equipment. A vehicle and a roller were the essentials. Employees supplied their own tools. Projects owned a van, roller, freight dolly and Hilti gun. Flooring owned a roller. El-Eid borrowed Projects' van when he needed a vehicle, or used a vehicle owned by his parents or the Wehbes. The roller which Wehbe delivered to the St. Mary's job the first day belonged to Flooring and had been borrowed by Projects after its roller was stolen. El-Eid also borrowed Projects' Hilti gun from time to time.

15. Projects and Flooring use the same firm of solicitors for legal work and the same accountant. The accountant incorporated Floorings for El-Eid. According to Wehbe, the solicitors and accountant are used as well by members of his family and the El-Eid family.

16. Subsection 1(4) of the Act reads as follows:

1-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination



thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

In order for the Board to have the discretion to declare, as Local 27 asks, that Projects and Flooring be treated as one employer for purposes of the *Labour Relations Act*, three prerequisites must be present:

- (1) there must be more than one corporation, individual, firm, syndicate or association, or any combination thereof;
- (2) the two or more entities concerned must carry on related or associated activities or businesses; and,
- (3) the activities or businesses of the entities concerned must be under common control or direction.

17. The first two prerequisites are satisfied on the facts of this application. The Board disagrees with the argument of counsel for Flooring that the activities and businesses carried on by it and Projects are unrelated because Projects has been in business for five years, does large jobs in the industrial, commercial and institutional (ICI) sector of the construction industry and has its own work force, whereas Flooring is just getting started in business, does small residential jobs which Projects does not do and has no work force other than El-Eid. Flooring was incorporated in anticipation of performing the Holy Angels school project which El-Eid described as his first big job. It and St. Mary's school are both ICI projects and, even assuming "business size" makes a difference (the Board thinks it does not), those two projects were substantial jobs requiring several weeks to complete, according to documents submitted in evidence by Flooring. The length of time an entity has carried on an activity or business is irrelevant to whether its activity or business is related to the activity or business of another entity. Nor is the existence or absence of a workforce by itself indicative of the relationship of activities and businesses of two entities in contention under subsection 1(4), particularly in the construction industry where successful businesses exist without directly employing any tradesmen. See for example *Krest Masonry Contracting*, [1988] OLRB Rep. Oct. 1022, a decision relied on by counsel for Local 27 for a different purpose. In addition, the "differences" which counsel for Flooring has identified are distinguishable from the fact situation in *Arbis Construction Ltd.*, [1983] OLRB Rep. Dec. 1959 on which he relies. The Board is satisfied here that Projects' and Flooring's activities and businesses are of the same character, serve the same market (resilient flooring contracting in the ICI sector of the construction industry) and utilize similar employee skills.

18. Therefore, if the Board is satisfied that the related activities and businesses of Projects and Flooring are carried on under common control or direction, it would have the discretion to make the declaration and provide other relief sought and it would become a matter of how it ought to exercise its discretion.

19. The Board has identified various criteria or indicia as providing some assistance in determining whether businesses which carry on associated or related activities or businesses do so under common control or direction. The following were considered in *Walters Lithographic Company Limited*, [1971] OLRB Rep. July 406, a decision referred to the Board by counsel for Flooring:

- (1) common ownership or financial control;
- (2) common management;



- (3) interrelationship of operations;
- (4) representation to the public as a single integrated enterprise; and
- (5) centralized control of labour relations.

20. While these criteria assist the Board in determining whether two or more entities are under common control or direction for purposes of subsection 1(4), each one need not be demonstrated and no single criterion stands out as determinative of that relationship, or as having more weight than the others. Nor is it necessary that Projects and Flooring themselves, or all of their activities and businesses, be under common control or direction. It is sufficient that the related activities be under common direction or control. In this respect, see the Board's analysis in *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9, at paragraphs 104 and 105, which the Board herein adopts. The Board is satisfied in this application, from the evidence of common management, interrelationship of operations, some measure of financial control and some measure of representation to the public that Projects and Flooring are a single, integrated operation, that the related activities or businesses which they carry on, are carried on under common control or direction within the meaning of subsection 1(4).

21. There is no common ownership of the two entities. Randa Wehbe owns Projects and her brother, El-Eid, owns Flooring. There is some evidence, however, of Projects exercising financial control over Flooring. The existence of some financial control is demonstrated by the manner in which Wehbe took Projects' employees off Flooring's jobs from time to time to complete deficiency work for Projects on the Rosedale Heights school job. The cost of their wages and benefits were being borne, at the time, by Flooring because, once the employees started work on its jobs, it was reimbursing Projects for wages and benefits. There is no evidence that the charges to Flooring were adjusted to allow for the time that the employees worked for Projects. Absent such evidence, it may be inferred that Flooring bore those costs and did so because through Wehbe, either as an employee of Projects or as "family", Projects exercised sufficient financial control over Flooring to do as it pleased in that respect.

22. The fact that Wehbe could so readily divert Projects' employees who were supposed to be working for Flooring from its jobs to Projects' Rosedale Heights job is an element in the common management of the two companies as well. Common management of the two companies is demonstrated also by other actions which Wehbe took on Flooring's behalf. He instructed Projects' employees working for Flooring on Holy Angels school to leave that job and perform particular work on St. Mary's school and then return to Holy Angels. He also took equipment and blueprints to the St. Mary's job and reviewed the prints with the employees and the work which they were to perform for Flooring. He discussed the scheduling of Flooring's work on the job with the general contractor's superintendent. Wehbe brought supplies to Holy Angels school for Flooring's use. He also discussed with the general contractor's superintendent on that job some concerns which the superintendent had with the terrazzo floor part of the job and how Flooring would satisfy those concerns. El-Eid was not as active on Projects' behalf, but he did make sure that Projects' deficiency work on the Rosedale Heights school job was attended to by Reilly.

23. One manifestation of Projects' and Flooring's interrelationship is in their financial dealings with each other, particularly respecting Projects' employees who worked for Flooring. The inadequacy of documentary evidence to support El-Eid's claim that he reimbursed Projects for all wages and benefits costs of its employees who worked for Flooring and that Projects reimbursed Flooring for payments it made to Projects' employees for working on the Rosedale Heights job, leads the Board to infer that a financial interdependency exists between them. That aspect of their relationship was conveyed, even if inadvertently, to Projects' employees who worked for Flooring

on the St. Mary's school job when they were paid by money orders purchased by Flooring accompanied by Projects' pay statements. Such financial arrangements, including Flooring's payment to one of Projects' creditors as part reimbursement of moneys owed by Flooring to Projects, are not the stuff of a normal, arms length commercial relationship.

24. Another aspect of the interrelationship of their operations is found in the arrangement for Flooring to use Projects' employees on Flooring's jobs. It too is not a normal, employees arm's length sub-contracting arrangement, otherwise Wehbe would not have been able, at his will, to take Projects' employees off Flooring's jobs to work on Projects' Rosedale Heights school job.

25. Other evidence of the interrelationship of their operations exists in the fact that Projects and Flooring use the same firm of solicitors and the same accountant; they share the use of the minimal equipment needed to carry on their related business activities; and Wehbe has referred and will continue to refer work to Flooring which Projects performed before it stopped taking new work in August 1991. This aspect of their interrelationship is significant to Floorings. With El-Eid's relative inexperience, it is unlikely that Floorings would have been able to obtain the Holy Angels and St. Mary's jobs. Also, since Flooring owned a roller, El-Eid's ability to use Projects' van and Hilti gun without cost whenever he needed them gave Flooring all of the equipment it needed to carry on its business of installing resilient flooring.

26. Projects and Flooring are small contractors operating out of the homes of their owners so it is not surprising that there is little evidence of them having been held out to the public as a single integrated business. There has been no need to do so. Nonetheless, Wehbe held them out to be a single concern when he held himself out to the superintendents of the Holy Angels and St. Mary's jobs as the person who could satisfy their concerns about the quality and scheduling of Flooring's work on those jobs. He also reinforced the impression that Flooring's and Projects' operations were integrated by the way he moved Projects' employees between those jobs and its Rosedale Heights job. That impression would be further reinforced by the fact that El-Eid was well known to Projects' clients as an employee of Projects. Certainly, Bradscot's superintendent looked to El-Eid for getting Projects' work completed on the Rosedale Heights job while Wehbe was away.

27. The facts fall short of establishing the presence of all five criteria referred to above and used by the Board to determine whether associated or related activities or businesses are carried on under common control or direction. However, given that the two respondents are owned and managed by members of a closely knit family, although separately owned, and do not deal with one another in a normal, arms length business manner, the Board is of the view that there is a sufficient interrelationship of their operations, along with some common management, financial control and representation to contractor clients as a single, integrated enterprise to infer that Projects and Flooring have carried on related activities or businesses under common control or direction from June 13, 1991, when Floorings was incorporated.

28. For these foregoing reasons and in all of the circumstances of the application, the Board is satisfied that R.R. Projects Inc. and Golden Arm Flooring Inc. carry on related activities or businesses under common control or direction within the meaning of subsection 1(4) of the *Labour Relations Act*. Thus the Board has the discretion to declare that they be treated as constituting one employer for purposes of the Act and the remaining question is whether it should make it.

29. Counsel for Floorings argues that a declaration is unwarranted. He submits that there has been no erosion of bargaining rights, since the employees of Projects who worked on Flooring's jobs were paid by Projects under the terms of the Agreement; there has been no siphoning of Projects' work to Flooring; and, Projects' employees were not confused about which entity was



their true employer. In short, counsel argues that no mischief existed which needed curing by means of a one employer declaration. Wehbe, for Projects' adopts that argument.

30. The Board disagrees for several reasons. the potential exists for erosion of Local 27's bargaining rights for Projects' employees and it is not required to wait until the actual erosion has been demonstrated; *West York Construction Limited*, [1978] OLRB Rep. Sept. 879; or until Projects' business has vanished, *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531, before it is entitled to have its bargaining rights protected by a one employer declaration. Local 27 acquired those bargaining rights January 17, 1991. In less than six months time, El-Eid, whom everyone knew as an employee of Projects, according to Wehbe, had incorporated Flooring. Its business objects overlap those of Projects in the area of contracting for the supply and installation of resilient flooring. It was formed for the specific purpose of performing a flooring contract for Bradscot on the Holy Angels School job. Projects was performing the same kind of work for Bradscot on the Rosedale Heights School job during this same period. El-Eid was also on that job doing piece work labour for Bradscot, and that is when he got Flooring's second contract, the one for St. Mary's school from Torcom. The contract would not have been available to Flooring had Wehbe not declined the job, after Projects had successfully bid for it, and recommended El-Eid to the general contractor, Torcom. Wehbe cited "financial problems" as the reason why he did not want Projects to enter into a contract with Torcom, but Projects did not adduce any evidence as to the specific nature of those problems. Nor did he tell the Board when Projects would resume taking contracts. He did make it clear, however, that he would continue to refer to Flooring other jobs which he might reject for Projects, because El-Eid was his closest relative and it made sense to give the work to him.

31. It is tempting, and in the Board's view, not unreasonable in these circumstances and having regard to the arrangements which Wehbe made with Projects' employees to work for less pay than they were entitled to under the Agreement, for the Board to infer that Wehbe refused the contract with Torcom and arranged for Flooring to take it instead, in order to circumvent Projects' collective bargaining obligations. It is unnecessary to do so, however, because the threat to Local 27's bargaining rights exists in the presence of Flooring as a company carrying on related activities or businesses under common control or direction with Projects. Flooring is there to fill the void for Projects by taking any business which Projects does not want. The St. Mary's school job is a concrete example. Contractors who have done business with Projects would know also that, if they do business with Flooring, they would still be able to rely on Wehbe's expertise and knowledge of resilient flooring. Wehbe demonstrated that amply on the St. Mary's and Holy Angels schools when, on Flooring's behalf, he dealt with the general contractors' superintendents respecting problems of work scheduling and work quality.

32. This arrangement allows Projects to divert all or any part of the business which it has pursued in the past to Flooring. Local 27 would represent employees engaged on any jobs which, but for the presence of Flooring, Projects might otherwise take in the future. The arrangement with Flooring removes the need for Projects to compete with other firms both non-union and unionized, without regard for the terms and conditions of the agreement. Therefore the arrangement also allows Projects to avoid its bargaining rights with Local 27 when seeking work covered by the Agreement. In that respect, see *Kustom Insulation*, *supra*. Given the importance which Wehbe attaches to the closeness of the two families and their demonstrated propensity for doing business together in a non-arms-length fashion, it would be reasonable for the Board to infer, and it does, that both Projects and Flooring would benefit from the arrangement. These are good and sufficient reasons for the Board to exercise its discretion by declaring that Projects and Flooring be treated as one employer.



33. Accordingly, in all of the circumstances of this application, the Board declares that R.R. Projects Inc. and Golden Arm Flooring Inc. are to be treated as one employer for purposes of the *Labour Relations Act*. The Board declares also that Golden Arm Flooring Inc. is bound by the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America effective May 1, 1990 to April 30, 1992. The Board is satisfied also that this is a proper case in which to adopt the reasoning in *J.D.S. Investments Limited*, [1981] OLRB Rep. March 294 and not limit the retrospective effect of the Board's declaration.

34. The Board is further satisfied that this is an appropriate application in which to grant additional relief in the form of a direction that Flooring pay to Local 27 the unsatisfied damages, if any, arising out of an award of \$27,247.60 damages against Projects by another panel of the Board on December 4, 1991. The award was made in an arbitration of a grievance against Projects referred under section 126 [formerly section 124] of the Act on October 22, 1991. The damages were awarded when the Board found that Projects had breached the Agreement by failing to remit the benefit plan contributions which, by the terms of the Agreement, it was obligated to remit. This application was made October 18, 1991 and included a request for relief in the form of an order that Flooring pay all outstanding benefits owed by Projects to and on behalf of members of Local 27. The request was pursued in final argument of this application.

35. The other panel of the Board has found that Projects has performed work covered by the Agreement, but did not comply with all of its financial obligations to its employees and to Local 27 under the Agreement. In this application, the Board has found that Flooring also operated outside the agreement to perform work covered by the agreement that should have been performed by Projects. These activities by Flooring and Projects took place in a context where the Board has concluded they ought to be treated as a single employer for purposes of the Act. In the circumstances here, it is appropriate that Projects and Flooring bear the burden of each other's transgressions. Accordingly, the Board directs that Golden Arm Flooring Inc. forthwith pay to Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of and in trust for its members, the unsatisfied damages, if any, arising out of the award of \$27,247.60 made December 4, 1991 against R. R. Projects Inc. in Board File No. 2410-91-G.

36. In summary, the Board has:

- (1) declared that R. R. Projects Inc., and Golden Arm Flooring Inc., are to be treated as constituting one employer for purposes of the *Labour Relations Act*;
  - (2) directed Golden Arm Flooring Inc., to pay damages as aforesaid to Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America; and
  - (3) dismissed the application in Board File No. 2374-91-R for the reasons given in paragraph 3.
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**0657-91-JD; 0789-91-JD; 0875-91-JD; 1670-91-JD; 1687-91-JD** Sheet Metal Workers' International Association, Local 537, Complainant v. **Kora Mechanical Inc.** and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener; Sayers & Associates Limited, Complainant v. Sheet Metal Workers' International Association, Local 30 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener; Harold R. Stark, Division of William Stark Group Inc., Complainant v. Sheet Metal Workers' International Association, Local 392 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener; Sheet Metal Workers' International Association, Local 269, Complainant v. E.S. Fox Limited and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Complainant v. Sheet Metal Workers' International Association, Local 30 and English & Mould Ltd., Respondents v. Ontario Sheet Metal and Air Handling Group, Intervener

**Construction Industry - Jurisdictional Dispute - Interim National Agreement between Sheet Metal Workers' and Plumbers' unions made in mid-1950s - Sheet Metal Workers' union and its locals only recently seeking to rely on Agreement to assert claim to exclusive jurisdiction over work in dispute - Board not determining complaint on basis of Interim National Agreement without consideration of other criteria**

**BEFORE:** *N. B. Satterfield*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

**APPEARANCES:** *A.M. Minsky* for Ontario Sheet Metal Workers' Conference and Sheet Metal Workers International Association Locals 30, 269, 392 and 537; *Alex J. Ahee*, *Brian J. Scott*, *B. Christie*, *D. Clark*, *Jim Boyle* and *Fred Wilson* for The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions 46, 67 and 463; *Richard J. Charney* and *Henry Dinsdale* for Sayers & Association Limited, *Harold R. Stark*, Division of William Stark Group Inc., and English & Mould; *W. J. McNaughton* and *D. Carrier* for E. S. Fox Limited; *Keith Billings* and *Bert Gardner* for Ontario Sheet Metal and Air Handling Group.

**DECISION OF THE BOARD;** June 10, 1992

1. These are five work assignment complaints made under section 93 [formerly section 91] of the *Labour Relations Act*. The common element of the complaints is that the work in dispute in each is closely similar and they all bring in to play the Interim National Agreement between the United Association of Journeymen and apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the Sheet Metal Workers' International Association. The

Interim National Agreement is dated August 31, 1956. On or about September 30, 1958 the parties issued three drawings for use in interpreting the Interim National Agreement.

2. At a pre-hearing conference with the panel, the parties came to an agreement about how to proceed with the complaints. Their agreement included the following elements:

- (1) that this Board panel be seized with hearing each complaint on its merits.
- (2) that the Board inquire into and determine the applicability and interpretation of the Interim National Agreement and the three associated drawings relative to the work in dispute in each complaint; and, as a result of that inquiry and determination,
- (3) that the Board determine what effect is to be accorded to the Interim National Agreement and the three drawings in the adjudication of each complaint.

3. The parties agreed also that, if the effect to be given to the Interim National Agreement and the three related drawings is not dispositive of the complaints, the parties will make further submissions on whether the complaints should proceed "*en bloc*" or individually.

4. The Board accepted the parties' agreement. It received their *viva voce* and documentary evidence during five days of hearings, following which the parties made written submissions respecting the conclusions which the Board should reach on the evidence.

5. The provisions of the Interim National Agreement relevant to the issues before the Board are:

August 31, 1956

INTERIM NATIONAL AGREEMENT

between the

UNITED ASSOCIATION OF JOURNEYMEN AND

APPRENTICES of the

PLUMBING AND PIPE FITTING

INDUSTRY

and the

SHEET METAL WORKERS'

INTERNATIONAL ASSOCIATION

It is the purpose of this interim agreement to improve relations between the two organizations, eliminate work stoppages, to settle jurisdictional disputes directly between the two organizations, and mutually to assist each union to secure work coming within their recognized jurisdiction.

It is understood that this interim agreement shall not relate to or have any bearing on jurisdictional disputes that may occur between either of the parties to this agreement and any other international union or subordinate body thereof.



It is understood that any adjustment made under the terms of this interim agreement shall not prejudice the jurisdictional claims of either international union.

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#### ARTICLE II-Room Radiators and Enclosures for Heating Purposes Only

(1) The installation of all room radiators, convectors and fin-type radiators when enclosures are made to fit the radiator or convector and shipped to the job as a manufactured unit shall be handled, unloaded and installed in their entirety by members of the United Association. An exception shall apply when an enclosure is made up and installed to cover space beyond the convector radiator, or used or installed beyond the cover of the manufactured convector unit to fill out a space between the end of the window bay and the radiator enclosure, in which case the handling, unloading and installation of such enclosure shall be the work of members of the Sheet Metal Workers. When an enclosure is specially fabricated and not shipped to the job as a manufactured unit, the installation of such enclosure shall be installed by members of the Sheet Metal Workers.

The three drawings are not suitable for reproduction in this decision. They include cryptic notes indicating which trade was to install the parts in the drawing. The Board has taken into account the drawings and annotations in coming to our conclusions herein. Although, if the drawings have application to the work in dispute, we note that even the parties who contend that the Interim National Agreement is dispositive of the complaints did not plead the drawing bearing the page number 180.

6. The Board received *viva voce* and documentary evidence about the work out of which these complaints arose and which was being performed on the projects of the employers in each complaint. The documentary evidence included extracts from commercial contracts covering the work in question, supplier specifications and drawings associated with the commercial contracts and supplier specifications. Having regard to that evidence and the parties' submissions, the Board finds that the work in dispute is:

the handling and installation of enclosures, together with their essential accessories, for finned tube convectors. The enclosures extend from wall to wall and pilaster to pilaster.

This, of necessity, is a generic description of the work in dispute on five projects:

Kora Mechanical Inc., at the Halton Regional Centre, Oakville. (Board Area #8)

Sayers and Associates Limited, at the 250 Yonge Street Project, Toronto. (Board Area #8)

Harold R. Stark, Division of William Stark Group Inc., at the Environmental Sciences Building, Trent University, Peterborough. (Board Area #11)

E.S. Fox Limited, at the Sears 2000 Warehouse Project, Belleville. (Board Area #12)

English and Mould Ltd., at the Toronto Dominion Centre, Tower 5 Project, Toronto. (Board Area #8)

In each complaint, the generic description of the work in dispute will be subject to the specifications and drawings relating to the enclosures.

7. The remaining issues relate to the Interim National Agreement, or more particularly, section 1 of Article II. They are:

- (1) does section 1 of Article II apply to the work in dispute and, if it does,
- (2) what effect should it have in the adjudication of each complaint?

8. Having regard to the evidence of the work in dispute on the five projects there can be no doubt that it falls within the work described in section 1 of Article II of the Interim National Agreement and, therefore, that Agreement is applicable to the work in dispute in the five complaints.

9. Having further regard to the evidence of the work in dispute, the evidence of some witnesses as to how they were able or unable to relate the supplementary drawings to that work and to the submissions of the parties on the applicability and interpretation of the Interim National Agreement and those drawings, the Board has concluded that it should not determine the five complaints on the basis of the Agreement and the drawings, whether or not they give exclusive jurisdiction for the work in dispute to members of one of the trade union parties. This is because the evidence strongly suggests that, with respect to the five employers, the Sheet Metal Workers' International Association and its Locals 30, 269, 392 and 537 have only recently sought to rely on the Interim National Agreement in seeking to assert their claim to exclusive jurisdiction over the work in dispute. The witnesses who testified respecting the work in dispute, and who had the ultimate responsibility of deciding how to assign it, are all persons who have extensive experience with the installation of heating, ventilation and air conditioning systems, including other jobs involving the same kind of work as is in dispute here. Two of them first became aware of the Interim National Agreement in 1989 and three of them became aware of it in 1991. One of them, Kurt Sikora, the principal owner of Kora Mechanical Inc., began in the industry as an apprentice in 1958. He first became aware of the Agreement when the complaint was made relating to his firm's job.

10. In these circumstances and bearing in mind that jurisdictional arrangements between trade unions are only one of several criteria which the Board usually considers in deciding work assignment disputes, it would not be appropriate to make the assignment on the basis of the Interim National Agreement without consideration of other criteria. To put it another way, even were the Board to interpret the Agreement and the drawings as giving exclusive jurisdiction over the work in dispute to one of the unions, these are not circumstances in which the Board can say conclusively that that would be the proper assignment no matter what evidence might come forward respecting such criteria as area past practice, employer past practice, economy and efficiency and employer preference.

11. Having come to that conclusion, the Board will not interpret the Interim National Agreement and the three associated drawings as they relate to the work in dispute in each complaint. The Board recognizes why these issues were litigated the way they were and appreciates that the parties proceeded in this manner because of the prospect of avoiding more extensive litigation. However, having determined for the reasons stated above that the Agreement and drawings would not be dispositive of the complaints, at this stage of the proceedings, it would not make good labour relations sense for the Board to interpret the Interim National Agreement and the drawings relative to the work in dispute. Were the Board to interpret those documents at this stage of the proceedings where, as yet, there is no need for it to do so, its interpretation might have fairly wide ramifications for others who are not represented in these proceedings.

12. This decision should not be read as this panel of the Board disagreeing with those decisions in which the Board has found jurisdiction arrangements between trade unions to be quite persuasive provided subsequent practice has been generally consistent with the arrangements. To the contrary, it makes good labour relations sense that trade unions which are bound to such arrangements and attempt to disregard them, should expect to have to demonstrate substantive grounds, such as a dominant area practice in their favour, in order to justify not complying with the arrangements. Even though employers are not parties to such arrangements, whether or not an arrangement may be dispositive of a dispute, where the trade unions have mutually relied on the arrangements to assert their respective claims over the covered work, it makes good labour relations sense that employers who have collective bargaining relations with the union parties assign the covered work in accordance with the arrangement unless it can demonstrate by convincing evidence that there were substantial grounds for a different assignment.

13. In the result of the Board's conclusions herein, if the complaints are to be heard on their merits, it will be necessary for the Board to receive the submissions of the parties respecting whether the complaints should be heard and decided "*en bloc*" or individually. Therefore, the Registrar is directed to schedule a common hearing for these complaints before this panel of the Board for that purpose.

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**2721-90-R Canadian Brotherhood of Railway, Transport and General Workers, Applicant v. Motor Coach Industries Limited c.o.b. as M.C.I. Service Parts Company, Respondent v. Group of Employees, Objectors**

**Bargaining Unit - Certification - Union seeking "all-employee" bargaining unit - Employer and objecting employees taking position that "office and clerical staff" should be treated as separate bargaining unit - Board applying *Hospital For Sick Children* test - Board finding that employees in unit sought sharing sufficiently coherent community of interest that they should be able to bargain together on a viable basis - Board determining that "all-employee" unit appropriate**

**BEFORE:** *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Ronson* and *K. Davies*.

**APPEARANCES:** *Marilynne Pitcher* and *Michael Mathews* for the applicant; *Scott G. Thompson*, *Tim English*, *George Normandin*, and *Laurie Brown* for the respondent; *Darlene Hawes* and *Donald Lawrence* for the objectors.

**DECISION OF THE BOARD;** June 30, 1992

1. In this proceeding, the applicant sought a bargaining unit consisting of

all employees of the respondent in Newcastle, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period.

The respondent and objecting employees took the position that the respondent's "office and clerical staff" should be treated as a separate bargaining unit.

2. On June 26, 1991 we released our decision that the unit applied for was appropriate. As the applicant had the requisite membership support among those employed in that unit on the



application date, we certified the applicant. We indicated that the reasons for our bargaining unit determination would be released at a later date. These are the promised reasons.

3. When this application was filed, there were twenty-two employees affected by it. Those employees worked in a facility which has, among other things, an office area and a warehouse area. A “shipper”, two employees classified as “receiver” and nine employees classified as “picker/packer” worked in the warehouse area. Four clerical employees worked in the office area and six customer service employees worked primarily in the office area.

4. The facility in question receives and ships parts for buses. The employees who work in the warehouse area are involved in the physical handling of these parts. They also supply information to the office area with respect to what has been received and where it has been put. Data entry clerks enter that information into a computerized database. Customer service employees receive and handle customers’ orders and requests for information with respect to parts. In order to answer customer inquiries they often need to get information which can only be obtained by physically examining the parts. At one time the customer service employees were all free to enter the warehouse for that purpose. More recently, the job of gathering information with respect to parts in the warehouse had been allocated to one of the customer service employees, so that the telephones are not left inadequately staffed.

5. When a customer service employee has firmed up an order for parts, employees in the office area generate an order document which the warehouse employees use to pick and pack the order. This document indicates what items are needed and where they can be found (thus retrieving for the warehouse employees the information they originally supplied). The warehouse employees also have access to the computer database maintained by the office employees, so that they can determine the number and location of parts in inventory. Employees in the warehouse area are expected to use towmotors to move quantities of parts which cannot be carried by hand. Employees in the warehouse area wear safety shoes and a smock. Employees in the office area do not.

6. One first line manager supervises the employees in the warehouse area, another supervises the customer service employees and a third supervises the four clerical employees. These three first line managers report to a single individual who manages the entire facility.

7. All of the employees have the same hours of work. They receive the same fringe benefits. The same methods of determining wage rates apply with respect to all positions in the workplace.

8. When there is a vacancy to be filled in any position in the workplace it is posted and any employee may apply for the position. In the eighteen months prior to the filing of the application, there were four occasions on which an employee moved from an office job to a warehouse job or *vice versa*. Glen Mason accounted for two of those moves: he started in a warehouse position, spent a year in a customer service position and then returned to the warehouse. He has since been called upon to fill in for a temporarily absent customer service employee. Randy Riopelle went from a receiver position in the warehouse to a customer service position in the office. A woman named Tony went from a customer service position to a warehouse position. The evidence also discloses that there have been moves within the office area between customer service positions and typist or data entry clerical positions.

9. There is one health and safety committee for the entire facility. The employees had a common smoking committee which met to determine how to deal with that issue; they now have a common smoking area. They share a lunchroom. They have a common Christmas party. They are

all involved in functions arising out of the departure of an employee. They are all called upon to share the common goal of seeing that parts are shipped on time and customers are properly serviced. If the facility has a “good month”, all of the employees are rewarded with an extra half hour off for lunch on the last Friday of the month.

10. In argument, reference was made to the considerations outlined in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 and *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. The applicant argued that there was a sufficient community of interest among all of the employees affected by this application to warrant including all of them in a single unit for purposes of collect bargaining. Counsel for the employer relied on the statement in *H. Gray Limited* (1955), 55 CLLC ¶18,011 that it was the Board’s “long established policy that in certification proceedings ... the Board ought to place office workers in a bargaining unit separate and apart from other employees, save in the most exceptional circumstances.” Counsel for the employer argued that the circumstances before us were not exceptional, and relied on the Board’s decision in *Leons Furniture Limited*, [1976] OLRB Rep. May 232, as a case in which the Board rejected a similar claim that office and warehouse employees should be included in a single unit.

11. The Board’s decision in *Leons Furniture Limited*, *supra*, did indeed reject a request that warehouse and office workers be placed in a single bargaining unit. There are both similarities in and differences between the circumstances described in that decision and the circumstances before us. The Board there determined that five different sorts of workers (commission sales people, office clerks, office cleaners, warehouse workers and truck drivers) constituted two appropriate bargaining units. The principles on which the Board determined that there should be two units rather than one are not elaborated in the decision in sufficient detail to be of compelling assistance with the different fact situation we have before us.

12. In *H. Gray Limited*, *supra*, the Board made these observations:

The Board, since its inception, has held the view that the interests of office employees and plant employees are divergent. In the early days of the Board’s history, the Board’s policy was that “the two groups should be included in the same bargaining unit only if they clearly express a preference for organization along those lines (see *Corbin Lock Case*, (1944) D.L.S. 7-1109 CCH CANADIAN LABOUR LAW REPORTER Transfer Binder, ¶16,406). Subsequently, in 1946, in the *Northern Electric Case* (unreported), the Board reconsidered its policy relating to office workers and came to the conclusion, based on the wider experience it had gained by that time, that, in the interests of all parties, office workers should be placed in a bargaining unit separate and apart from other employees, even though, as was the fact in that case, there was evidence that the office employees clearly expressed a preference for inclusion in the same bargaining unit with other employees. In 1947, the Board, differently constituted, held, in the *Electric Auto-Lite Case*, (1947) D.L.S. 7-1343, CCH CANADIAN LABOUR LAW REPORTER, Transfer Binder, ¶16,499, that a trade union which represented the plant employees of an employer could not be certified as bargaining agent on behalf of his office workers. ...

... Whatever the situation may have been under the legislation in force in 1947, we are unable to find anything in the present Act which confers upon the Board, either expressly or impliedly, authority so to limit the choice of the employees in the present context. ... I am of the opinion that the principle of the *Electric Auto-Lite Case* (*supra*) has no application under the present legislation except where a case comes within the terms of section 8 [now section 12] of the Act and that the same trade union, whether it be an “international” or a “local” of an “international”, may be certified as bargaining agent for a bargaining unit of office employees as well as for a bargaining unit consisting of other employees. However, nothing I have said here is to be taken as indicating an intention to depart from the long established policy that in certification proceedings - and I am not concerned here with what parties may do in voluntary recognition situations or in collective bargaining following certification - the Board ought to place office workers in a bargaining unit separate and apart from other employees, save in the most exceptional circumstances. ...



The decision in *H. Gray Limited, supra*, does not say what sort of “office” and “plant” were contemplated by the long established policy to which it refers, nor does it indicate what circumstances had led the Board to conclude as a general matter that the interests of office employees and plant employees were so divergent as to warrant a “policy” of almost invariable separation. The observation in *H. Gray Limited, supra*, that the Board had held this view “since its inception” suggests that those circumstances, whatever they may have been, were circumstances prevailing in the mid-1940’s when the Board was first established. Reference to the *Corbin Lock Case* is of no assistance in pursuing these issues, as that decision does no more than recite that “in the opinion of the Board, the interest of employees in a plant and those in an office are so divergent that the two groups should be included in the same bargaining unit only if they clearly express a preference for organization along these lines.” Again, there is no description of the characteristics of “plant” and “office” employment or other matters which are said to warrant this opinion. The *Electric Auto-Lite Case* is equally silent on these points, and the unreported *Northern Electric Case* decision referred to in *H. Gray Limited, supra*, is not available to us.

13. The “policy” in question is one which had fully matured more than forty-five years ago. In the state of the reported jurisprudence, we can only speculate on the facts and circumstances which might then have led the Board

to articulate a “policy” that office workers would be excluded from a plant unit “except in the most exceptional circumstances.” On the face of it, the basis of these pronouncements was its assessment of community of interest. We have no difficulty imagining that circumstances in which plant and office employees shared an adequate community of interest were “exceptional” in the workplaces being organized in the 1940’s. It would have made sense for the Board to make it very clear that arguments for inclusion of office workers in the units sought by trade unions were unlikely to succeed, if that was its experience. We do not think that the Board’s statements about the conditions of the 40’s and 50’s can be taken as an undertaking that the Board would continue to apply an “exceptional circumstances” test into the 90’s despite changes in the nature of the workplaces being organized.

14. The nature and kinds of employment and the ways in which jobs are created, staffed and valued have all changed considerably in the last forty-five years. The fact that one person’s work area is described as an “office” and another’s is not does not always carry with it the same implications as it did forty-five years ago. We imagine that a workplace like this one, where the same pay scheme applies equally to office and “plant” employees and where office employees can apply for and are transferred to “plant” jobs and *vice versa*, would have been “most exceptional” in the 40’s and 50’s. We are not confident that that is so today. In any event, section 6 of the Act requires us to determine what is “appropriate”. As the Board observed in *Hospital For Sick Children*, [1985] OLRB Rep. Feb. 266, at paragraph 23, that involves answering this relatively simple question:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?

The question the Board has to address does not change because office and clerical employees are involved. The question is still whether the unit proposed by the applicant is appropriate, not whether the circumstances can be described as “most exceptional.”

15. The separation of “office and clerical employees” from others in composing a bargaining unit is sufficiently conventional that the Board will act without further inquiry on an otherwise unchallenged agreement by affected parties that such a course of action is appropriate. Equally,



given the diversity of modern jobs and of the workplaces in which they are performed, it is also possible today to imagine workplaces in which an “all employee” unit from which “office and clerical employees” are *not* excluded would be entirely appropriate. The agreement of the parties does not relieve the Board of its obligation to make a finding under section 6 of the Act that a unit agreed to is appropriate. The appropriateness of an inclusive unit is sufficiently plausible, however, that the Board has acted and will act on an unchallenged agreement that it is appropriate without further inquiry and, in particular, without requiring that “most exceptional circumstances” be pleaded or proven.

16. In this case, the respondent’s own treatment of the affected employees as a single unit for purposes of employee relations and the history of employee transfer between the groups which the respondent sought to have us separate demonstrated that the employees in the unit sought in this case shared a sufficiently coherent community of interest that they should be able to bargain together on a viable basis. The employer did not argue that this would cause it any labour relations problems, serious or otherwise. It simply argued that we had been shown no particular reason to “depart” from the “policy” pronounced in *H. Gray Limited*. For the reasons we have already set out, we did not find that argument compelling. The test propounded in *Hospital For Sick Children*, *supra*, having been satisfied, we found that the unit sought by the applicant was appropriate.

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**2663-87-JD** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Complainant, v. **Pigott Construction Limited**, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener #1 and Labourers’ International Union of North America, Local 506, Intervener #2

**Construction Industry - Jurisdictional Dispute - Work in dispute involving installation of washroom accessories - General contractor assigning work to carpenters directly employed by it - Plumbers’ union relying on International Agreement to claim work - General contractor not employing any plumbers directly and having no collective agreement with Plumbers’ union - Board upholding complaint that work should have been assigned in accordance with International Agreement**

**BEFORE:** *M. G. Mitchnick*, Chair, and Board Members *J. Lear* and *H. Kobryn*.

**APPEARANCES:** *L. C. Arnold* and *Vince McNeil* for the complainant; *R. A. Werry* and *J. C. Keyes* for the respondent; *J. J. Nyman* and *Lorenzo Monaco* for intervener #1; *John Moszynski*, *Manuel Silva* and *Jim Johnstone* for intervener #2.

**DECISION OF THE BOARD;** June 25, 1992

1. This is a work-assignment complaint brought under section 93 (formerly 91) of the *Labour Relations Act*. The complaint was filed on December 23, 1987, although for a variety of reasons, including principally the manner in which parties have come to put evidence of “area practice” before the Board, the case has taken in excess of 4 years from that point to reach its final day of hearing. The work itself on this job was completed in 1988. The claim by the complainant Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fit-

ting Industry of the United States and Canada (“the Plumbers”) is for the handling and installation (including the backing) of standard washroom accessories at what is described as “the St. Joseph’s Hospital Renovation and Addition Project” in Toronto. While the parties were in dispute as to how to characterize the various accessory items involved in this project, for the purpose of the declaration at issue here we are prepared from the photographs submitted to describe them as toilet paper dispensers, grab bars, sanitary napkin dispensers and disposals, paper towel dispensers and disposals, towel and soap dispenser units with mirrors, travelling shower-heads, towel racks and slop-sink utility shelves.

2. Typical of general contractors, Pigott directly employs both carpenters and labourers, for whom it has collective agreements with both the United Brotherhood of Carpenters and Joiners of America (“the Carpenters”) and the Labourers’ International Union of North America (“the Labourers”) respectively. Pigott *never* employs plumbers directly, and accordingly has no collective bargaining relationship with the complainant or any other Union that might represent the trade of plumbers. To have this work performed by plumbers, therefore, Pigott has placed itself in the position of having to have the work done by a subcontractor, and that raises for Pigott concerns about cost, and its ability to entirely control and schedule the deployment of the workforce. As a result, Pigott’s own preference is to “do the work itself”, which means engaging the services of its own carpenters (tended in the usual way by labourers), and certainly its “predominant” practice (with exceptions that will be noted) is exactly that. The installation of the accessories is typically done in the latter or “finishing” stages of a job, and this mode of work assignment also serves to provide work for some of the “steady-eddies” in the general’s work force that are maintained on the job site for various purposes from start to finish.

3. The reality (and source of the dispute) is, of course, that the task of properly affixing these items to a wall is hardly central to the core skills of either of the two crafts here contesting it; it obviously can be (and is), in other words, performed by members of either craft. As a result, the struggle between Plumbers and Carpenters over who should do this washroom work is neither new nor confined to the present jurisdiction. In fact, the dispute is so long-standing and intense that this very issue came to be addressed at the International level of both trade unions, with the result that an “agreement of record” can be found as far back as 1939 in the “Green Book” (of the Building and Construction Trades Department’s “Plan for the Settlement of Jurisdictional Disputes”). A similar but more detailed version appears in the Record of Construction Craft Jurisdiction Agreements as follows:

**Backing and Accessories - June 29, 1965**

AGREEMENT

June 29, 1965

BACKING and ACCESSORIES

BACKING

1. The installation of all backing for plumbing fixtures and their accessories not affecting the structure shall be the work of the United Association.
2. Cutting and chasing which does not affect the structure shall be the work of the United Association.
3. The installation of all backing for plumbing fixtures and their accessories which affects the structure shall be the work of the Carpenters.

4. Cutting and chasing which affects the structure shall be the work of the Carpenters.

#### ACCESSORIES

1. Accessories which are directly related to plumbing fixtures such as grab bars, paper holders, towel racks and bars, utility shelves, sanitary paper holders, glass, cup, soap holders, soap dispensers, sanitary napkin dispensers and disposals, combination towel dispenser and disposals, shall be the work of the United Association.
2. Accessories which are not directly related to plumbing fixtures such as laundry chutes, hampers, clothes hooks and lines, medicine cabinets, magazine racks, storage cabinets, cabinet shelves shall be the work of the Carpenters.

For the United Brotherhood of Carpenters and Joiners of America

For the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

"M. A. Hutchison"  
General President

"Peter T. Schoemann"  
General President

"R. C. Limigatos"

"Frank J. Lucas"

"Leon W. Greens"

"Thomas J. Dugan"

"Raleigh Rajoppi"

"Joseph T. Perry"

"Patrick A. Hogan"

"Mack C. Roberts"

"N. E. McDaniels"

"Ian D. Escobar"

For some 20 or so years from that further agreement there appears from the evidence to have been a kind of "truce" over the issue, at least in the area relevant here, Board Area 8 in the Province of Ontario. That is not to say that the installation of washroom accessories in the industrial, commercial and institutional sector was done throughout that period exclusively by the Plumbers'. Indeed, the Plumbers' appear to have been quite practical about the jobs in which they insisted that the aforesaid international agreement on washroom accessories be applied. Many jobs, although large in terms of the structure, involved few washrooms, where it would make little sense to bring plumbers back just for the finishing stage, as opposed to allowing the general to complete the job with its own on-site forces. Similarly, many jobs of this smaller variety were performed either directly or on subcontract by specialty carpentry firms, and in fact would be of a size where officials of another Union might well not even *know* about them. In both of these situations the Carpenters' Union built up a very substantial history of their members doing this work. Those types of jobs, having a limited number of washrooms, make up by far the greater part of the Carpenters' "area practice". There are, however, a number of the larger, "high-profile" type of projects on the list for the Carpenters' as well - although the greater number of those we note occurred *after* the battle lines had been drawn, from 1987 onwards, around the present project in dispute. Sean O'Ryan, the current Business Manager of the complainant, and a business representative since 1980, explained in his testimony that until recent events there had existed between his Union and the Carpenters' a certain amount of "live and let live", and that if the Plumbers' became aware of a job after the Carpenters' had already gotten under way, they sometimes decided not to make an issue over it. On the other hand, the Plumbers' evidence is uncontradicted that, *until* these recent events, each and every time the Plumbers' did find it appropriate to push the issue of the installation of washroom accessories on a job, the international representatives of the Carpenters' Union



acknowledged that the 1965 agreement was determinative, and the work was assigned (or re-assigned) to the Plumbers' on that basis. James Boyle, now a business representative for the complainant but then a plumber in the trade, testified, for example, that that happened in 1971 at the Manulife construction project in Toronto, and that the work was turned over to the mechanical contractor even after the Carpenters' had started. Mr. Boyle testified that he and other members of the Plumbers' Union were assigned the work on numerous large jobs from that point forward, without there ever being a complaint or a dispute from the Carpenters' Union. In contrast to the Plumbers' evidence, in fact, there is *no* occasion in the other parties' evidence where the work in dispute had been the subject of an initial assignment to the Plumbers', and the Carpenters' raised a complaint and effected a change.

4. The evidence of the other U.A. witnesses, outlining the large number of jobs on which members of the Plumbers' Union have been engaged through mechanical contractors to perform this work in Board Area 8, is to the same effect as that of Mr. Boyle. Bob Watson, until his retirement last year the senior international representative of the Plumbers' in Ontario, testified that if and when disputes over the washroom accessories did arise, he would deal with them at the level of his Carpenters' counterpart, John Carruthers, and Mr. Carruthers always would honour the 1965 agreement. At one point in 1978, in fact, after a dispute had once again been resolved on that basis, the Plumbers' business representative suggested to Mr. Watson that a reaffirmation of the Internationals' agreement as effective and applicable might be useful, and Mr. Carruthers and Mr. Watson met in Toronto and signed the following:

November 3rd, 1978

TO WHOM IT MAY CONCERN:

This will confirm a meeting held in Toronto on November 3rd, 1978, whereby it was agreed that the Agreement for Backing and Accessories which was signed on June 29th, 1965 is a valid agreement and is recognized by the United Brotherhood of Carpenters and Joiners of America and the United Association.

Yours fraternally,

"R. Watson"

Robert Watson  
International Representative

"John Carruthers"

John Carruthers  
Executive Board Member  
Ninth District

From there through 1986 the evidence is that that international agreement continued to be recognized, even after Mr. Carruthers went on to assume responsibilities for all of Canada and Ted Ryan assumed the former role of Mr. Carruthers with respect to Ontario. In 1980 Jackson-Lewis had assigned the installation of washroom accessories to its own carpenters, represented by Local 27, at its Markborough Place job, Phase I, but a switch to the Plumbers' was made, through the mechanical on site, once Mr. O'Ryan showed the international agreement to the Carpenters' business representative. In 1985 the international agreement again was applied at a St. Lawrence Centre job, and at a job of Pigott itself at the Grace Hospital in Scarborough. In the latter case the entire washroom-accessories contract had been let to a specialty contractor, Islander Westland, and in the end an agreement was worked out whereby the complainant would supply men to install, and Islander Westland would apply the wages and conditions of the applicable collective agreement. It might be added that, while there are numerous examples to the contrary, Pigott on

its own has performed this work through a mechanical contractor and the Plumbers' at jobs at the Toronto General Hospital, as well as at a couple of jobs outside the relevant Board area, in Hamilton. In 1986 Mr. Watson again had to intervene on a project (not of Pigott's), at Water Park Place on the Queen's Quay in Toronto, and Mr. Ryan's acceptance of the 1965 agreement on behalf of the Carpenters' was documented by Mr. Watson in internal (but unchallenged) correspondence as follows:

June 24, 1986

Mr. C. Thurrott, Bus. Rep.  
Local Union 46, United Association  
936 Warden Ave.  
Scarborough, Ontario M1L 4C9

Re: Installation of Washroom Accessories  
Water Park Place project  
Queen's Quay - Toronto

Dear Sir & Brother:

This will confirm that at a meeting held on May 23rd, 1986 between International Representative Ted Ryan of the Carpenters, and myself, with local Business Representatives in attendance, it was agreed the installation of the washroom accessories was the work of the United Association, in keeping with our Agreement of Record between the two International Unions dated June 29th, 1965.

Dave Smith, representative for P.C.L. Construction Limited, the General Contractor, was so advised and the work was turned over to the mechanical contractor on site, namely Brady & Seidner Mechanical.

Faternally yours,

"R. J. Watson"

R. J. Watson,  
International Representative, UA

5. That, however, appears to have marked the end of the "peace" on the issue. Mr. O'Ryan testified that he was aware of the washroom-accessories issue heating up politically within Local 27 itself, and in the 1988 round of ICI bargaining two material changes were effected to the Carpenters' provincial agreement. One was the addition to the list of work claimed as the Carpenters' jurisdiction in Schedule A to their agreement of:

"Installation of washroom accessories and toilet partitions".

Secondly, the Building and Construction Trades' Department's "Plan for the Settlement of Jurisdictional Disputes" (which currently provides for initial referral to an Arbitrator) contains the following directive to the Arbitrator in deciding a claim:

Sec. 8. In rendering his decision, the Arbitrator shall determine first whether a previous decision or agreement of record between the parties to the dispute governs. If the Arbitrator finds that the dispute is not covered by an appropriate or applicable decision or agreement of record, he shall then consider whether there is an applicable agreement between the crafts governing the case. If no such agreement is in effect, the Arbitrator shall then consider the established trade practice and prevailing practice in the locality. Because efficiency, cost or continuity and good management are essential to the well-being of the industry, the Arbitrator shall not ignore the interests of the consumer or the past practices of the employer.

Article 19.02 of the '86-'88 Carpenters' collective agreement provided:

19.02 Work jurisdiction not described in Schedule "A" shall be settled by final determination by the Impartial Jurisdictional Disputes Board for settlement of jurisdictional disputes or its successor. Requests for a decision shall be filed by either EBA or Ontario Provincial council hereinafter referred to as the OPC.

Any assignments made before a final determination by the Impartial Jurisdictional Disputes Board in any local area may or may not, at the discretion of the employer, be changed, but in any event the original assignment shall not be the subject of any grievance claiming damages. However, subsequent assignments shall be made in accordance with the said final determination and such decision shall remain as the established local area work practice until changed by such tribunal.

Whether intentionally related to the present issue or not, this reference to the Impartial Jurisdictional Disputes Board (or the Plan in any form) is removed entirely from the 1988-90 collective agreement. The Plumbers' witnesses testified to a marked turnaround in not only the position of the Carpenters' international representatives over the washroom-accessories issue, and in particular the effect of the 1965 agreement, but also of the general contractors. It has been noted as well by a number of witnesses familiar with the industry that it was becoming increasingly common to find the washroom accessories specified in the general's portion of the tender documents, rather than, as previously, in the Mechanical section. And in line with that it appears that more generals are, like Pigott in this case, doing the work themselves - which means with carpenters. The Plumbers' witnesses testified that they felt that what was occurring in the field was that Local 27 was now using the added Jurisdiction language in its collective agreement to threaten contractors with grievances, should the work in dispute not be assigned to them. It is the evidence of John Cartwright, the Carpenters' Business Manager, however, that the addition to Schedule "A" was meant only to clarify a jurisdiction the Carpenters felt they always have had under the agreement, and that there have been no threats whatever made by his Union to contractors with respect to the installation of washroom accessories. Mr. Cartwright added his speculation that it was in fact the economic climate which was driving the generals in this direction, and there is certainly evidence before the Board which would tend to bear that out. Apart from the evidence given by Pigott itself, for example, Mr. McNeil testified about recent events at Markham Hospital, where Ellis Don, a general who had *always* subbed this work to mechanicals and the UA, decided for the first time to do the work with members employed by it from the Carpenters' Union. That was not, Mr. McNeil testified, the only work-assignment change he felt the general was making to long-standing jurisdictional practices, and when he pointed this out the response he got from the general's job superintendent was that "the bottom line is [now] price".

6. The arguments in favour of the employer's assignment in this case are much the same by the respondent and two interveners. They rely in the first place on the fact that no collective bargaining relationship exists between Pigott and the complainant Plumbers' Union, whereas Pigott *does* have a collective bargaining relationship with the intervener Carpenters'. Secondly, they argue that area practice is at best mixed, and that in fact on the totality of jobs, including Pigott's, area practice overwhelmingly favours the Carpenters'. All that the complainant has to rely on, they submit, is its international agreement, which, they say, has never been accepted by Local 27, and is not a document that is binding on the employer. On economy and efficiency, Pigott refers the Board to a synopsis of a case emanating from the Construction Industry panel of the Nova Scotia Labour Relations Board, which it submits stands for the proposition that where work does not involve the "core skills" of a trade, employers ought to be free simply to carry out the work in the cheapest way they can. In that regard, Pigott submits, the 1965 agreement is wholly inconsistent with the direction the industry is moving in, and places a cost on the industry that the market can no longer tolerate.



7. The Board is not unmindful of the practical considerations which surround the position put forward by the employer in this matter. To put the matter in its simplest terms, “Do you really need a plumber to screw a towel dispenser on a wall?”. There are, however, a number of other considerations, every bit as practical, to be taken into account as well. Every system for the settlement of jurisdictional disputes has as a primary goal the elimination of “wobbles” in the workplace, and the substitution in their stead of a rational and credible mechanism to decide the disputes. To make that process work effectively it is necessary for the parties themselves to have some idea what the “rules” are, and that of course is what the system that the Building Trades developed, around their original and then amended Plans, was seeking to accomplish. And those Plans always recognized that, with the not-infrequent occurrence of a contractor being a party caught in the middle between two combating Unions, a “peace” that could be worked out between the two Unions themselves was a priority consideration. If some of such comprises were less than “perfect”, they at least provided stability, and all of the benefits for the industry, and for contractors who might otherwise “guess wrong”, that that entails. Economy and efficiency are and always have been considerations for this Board which in particular situations may become dominant, but for this Board to signal a sudden shift to considerations of pure economy, and a wholesale scrapping of old established rules, does not appear to us to be in the interests of anyone (except perhaps those trade unions sitting at the lower end of the rate scale). Here, it should be noted, the contest is between skilled plumbers versus skilled carpenters, and there is no evidence that if Pigott *did* choose to hire plumbers directly, as it does with carpenters, the cost would be any different. Indeed, the evidence is to the contrary.

8. Local 27 recognizes the problem of jurisdictional disputes, but argues that what is needed is a “made-in-Ontario” solution. That is interesting, but of little assistance until such a mechanism *is* in place, and any efforts to develop a consensual process for this province have to this date proven fruitless. The Carpenters’ real pitch on the point perhaps (as they rely on the “Green Book” for some things, reject it for others) is that for any “international” agreement to be valid, it must “accord with Ontario reality”. If that is simply another way of saying that it must be an agreement that has been enforced and *honoured* in the local area, we agree. It is not, however, sufficient that a Local Union has never *liked* the agreement, and has sought to undermine it where they could. In *Canadian International Comstock Co. Ltd.*, [1971] OLRB Rep. Aug. 477, the Board did make reference to a particular pipe-laying agreement between the General Presidents of the Labourers’ and Pipefitters’ Unions which the Board notes had from its inception been the subject of “disputes” over its interpretation and application. The mere existence of such “disputes” is not the *ratio* of the decision however, as the Board goes on to state more pointedly with respect to the geographic area in dispute:

14. ... No useful purpose would be served by outlining the nature of the disputes over the Memorandum *as no effort has been made by either trade to enforce it in Northwestern Ontario...* Accordingly, there are no agreements on file which assist the jurisdictional claim of either the Labourers or the Pipefitters.

(emphasis added)

9. While the Locals of an international trade union look to their constitution for work jurisdiction, and are by that same document made subordinate to “the International”, it is true, as the Board observed in *General Concrete Ltd.*, [1972] OLRB Rep. May 418, that the acts of two trade union internationals are not, strictly speaking, binding on an employer party. A better illustration of what this can mean is the *Beer Precast Concrete* case, [1970] OLRB Rep. Aug. 610, where the employers in the local area in question, because of its cost implications, simply refused to accept and apply the terms of the putative international agreement from the beginning, but rather continued with their practice as it had always been. The agreement was, therefore, out of

line entirely with the actual practices that had been developed and maintained in the local area, and not found to be of particular assistance to the Board in the circumstances of that case. In a similar vein, see *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143. That, notwithstanding the assertions of Pigott and the Carpenters', is not the case here. While there does appear, as Mr. O'Ryan said, to have been a considerable degree of "live and let live" by the Plumbers', in not insisting on the strict application of the international agreement where, either because of the size or stage of the project it would be impractical to do so, where the Plumbers' *did* see an appropriate project for having the agreement applied, they did so - and did so successfully. We are satisfied on the evidence that the more uniform "change" in employer posture has come only in the period surrounding the instant project, and we do not find compelling in the circumstances the arguments for the Board to now give less weight to the 1965 agreement than the two internationals, as well as contractors in Board Area 8 on jobs where it was raised, consistently had done in the past. On the other hand, we would add that we do not find it appropriate in a case like this to give any weight whatever to a change in the practice of the architect or owner as to where they unilaterally choose to place the washroom accessories in their specifications, nor to enhancement in a "Work Jurisdiction" clause negotiated bilaterally under the collective agreement of one or the other of the trade-union parties to a section 93 dispute.

10. That leaves the Board having to consider whether the complainant is disentitled from seeking any relief from this Board by virtue of the fact that it does not have a collective-bargaining relationship with the employer Pigott. The first point to note about this argument by the respondent and interveners is that it has nothing whatever to do with the issue that arose before the Board in, for example, *Simcoe Mechanical Contracting Limited*, [1982] OLRB Rep. Sept. 1352. There the Plumbers' purported to bring a section 91 complaint (now 93) on a job on which the work *was* being done by certified plumbers. Local 46's problem was that the bargaining rights for those plumbers (employed by "Simcoe Mechanical") were held by C.L.A.C. - notwithstanding repeated unsuccessful attempts by the U.A. to wrest such bargaining rights in various parts of the province through the normal certification route. How Local 46 could have expected the Board to support such a purely *representational* claim in the guise of a "jurisdictional dispute" proceeding is difficult to imagine, and the Board in the end says just that. The other point to note about the collective-agreement argument of the respondent and interveners is that it is an argument arising not out of the fact that the complainant has not done its job of organizing, but rather purely out of the fact that Pigott for its own reasons has maintained a policy of not *hiring* any plumbers. To us it ignores the reality of how generals operate in construction to suggest that that alone should "change the rules" as to how work is traditionally to be apportioned between the trades in the industry - and indeed, as we have recounted, prior to the period of this dispute forward, it in material terms has not. All of this was usefully commented upon by the Board in the forerunner to the present case which involved the claim of both the IBEW and the UA on patient-modules, reported now as *Pigott Construction Limited*, [1990] OLRB Rep. Apr. 441 ("Pigott I"), commencing at paragraph 28:

28. Pigott has no comparable obligation to the IBEW and the UA. How, then, can those unions legitimately claim that Pigott was obliged to assign the work in dispute to IBEW electricians and UA plumbers? If there is an answer to that question that is favourable to the complainants, it is to be found in the construction industry context in which the dispute arises.

29. The work in dispute is in the industrial, commercial and institutional ("ICI") sector of the construction industry in Metropolitan Toronto and nearby municipalities, as were all 17 hospital construction projects in evidence herein. The unionized part of the ICI sector of the construction industry in Ontario has been subject to the province-wide bargaining scheme of the Act since 1978. Pigott, the Carpenters, the Labourers, the IBEW and the UA are parties to whom the province-wide bargaining scheme applies. The collective agreements binding upon Pigott, the Carpenters and the Labourers are products of bargaining under that scheme. While the



IBEW and the UA are not bound to collective agreements binding on Pigott, they are bound to the electricians provincial agreement and the plumbers provincial agreement together with electrical and mechanical contractors for whose electricians and plumbers the IBEW and the UA hold bargaining rights in the ICI sector. When Pigott and the other general contractors on 16 of the 17 hospital construction projects in evidence decided to subcontract the work which included the installing of the patient service modules, they subcontracted the work to electrical or mechanical contractors bound to the electricians and plumbers provincial agreements. As a result of those subcontracts, the patient service modules were installed by IBEW electricians and UA plumbers under their respective provincial agreements. Where the patient service modules were to house both electrical and medical gas services, they were installed by crews composed of equal numbers of IBEW electricians and UA plumbers, except on Pigott's Scarborough Centenary Hospital project where they were installed by IBEW electricians. Pigott was not obliged, and there is no evidence the general contractors on the other hospital projects were obliged, once having decided to perform the work, to let it to a subcontractor who would have the work performed by persons belonging to those two unions. The Carpenters union was aware of those subcontracts and the resulting work assignments to IBEW electricians and UA plumbers, but did not contest any of them. So, whatever claim to the work in dispute the Carpenters union has under Schedule "A" and clause 19.01 of its provincial agreement or the collective agreements which were in force prior to province-wide bargaining in 1978, it did not rely on those provisions to claim the work by way of grievances or work assignment complaints.

30. Having work performed by way of subcontract to trade contractors like the electrical and mechanical contractors on the hospital projects, is fairly typical of building construction in the unionized part of the ICI sector of the industry. That practice results largely from the historical development of a division of labour in the construction industry based on the principle of operational specialization, particularly in the United States and Canada.

31. The effect of the division of labour by trade or craft is clearly visible in the international unions which represent construction tradesmen in Canada and the United States. Approximately 20 of these unions joined together to form the Building and Construction Trades Department of the AFL-CIO. They are known as the building trades unions. Some 13 of these building trades unions have a presence in construction in Ontario. They also are the unions who hold the exclusive bargaining rights for their trades under the province-wide bargaining scheme in the ICI sector. Historically each building trades union has sought to organize all of the employees in its trade rather than all of the employees of an employer, as in the industrial union model. Each claims to itself exclusive jurisdiction in the construction industry for its trade and the work performed by the trade. That is one means by which each of these unions seeks to assure that its members will retain a share of the available work in the industry. These are institutional claims and, while the building trades unions will seek to enforce their claims through protective provisions in their collective agreements, they have used whatever lawful means which they thought would be effective in the particular circumstances. A classic work jurisdiction dispute results when a union perceives "its work" being done by persons other than its members and seeks to change that circumstance by demanding that it be done by its members. Where, as here, it occurs in the unionized ICI sector of the industry, it is a struggle between two or more of the building trades unions over which union's members will do the work.

32. One of the effects of operational specialization on building construction is visible in the way employers have organized themselves to perform construction work. Typically there are general contractors and trade contractors. A general contractor usually deals directly with the purchaser of construction and takes charge of an entire project. The general contractor may employ bricklayers, carpenters, construction labourers, cement masons (cement finishers), operating engineers and rodmen, but may, and frequently does choose to perform only a limited amount of work with its own employees. Instead it will choose to subcontract packages of work to subcontractors, many of whom will limit the work they take to that which is performed by one or two trades. These are the trade contractors and their specialization is defined by the trades which they employ and, in the unionized part of the industry, by the trade unions representing those trades. In the unionized ICI sector in Ontario, an electrical contractor employing only electricians represented by the IBEW and a mechanical contractor employing only plumbers and steamfitters represented by the UA would be common examples of trade contractors. 16 of the 17 hospital projects in evidence in this proceeding are examples of general contractors subcontracting packages of electrical and mechanical work to electrical and mechanical trade contractors.



33. One of the obvious consequences of such practices is that trade contractors are largely dependent upon general contractors continuing their subcontracting practices. So are the trade unions which represent those trades dependent on the practices continuing for there to be work opportunities for their members, unless, of course, the general contractor employs them directly to do the work. Where, as has happened here, the general contractor assigns work directly to a trade different from the one which would have performed it had the general contractor subcontracted the work, it poses a difficult dilemma for the trade union whose members lose the work opportunity. For example, in the instant case, the real complaint of the IBEW and the UA is with Pigott (and the Carpenters and the Labourers), but they have no collective agreements with Pigott and, therefore, no grievance and arbitration process available to them. The agreements binding on the IBEW and the UA are with electrical and mechanical contractors who likely share with the two unions their interest in retaining jurisdiction over the work in dispute. When Pigott disagreed with the complainants' claim to the work, they pursued the claim by filing this complaint under section 91 of the Act.

34. Work jurisdiction disputes are a perennial problem for the construction industry. Seen from outside the industry, they appear to be senseless fights between members of the building trades family of unions about which union's members are to get a particular work assignment; or, to put it another way, about which union's members will be employed and which ones will be unemployed. But when such disputes are viewed in the context of the operational specialization prevalent of the construction industry, the claim of jurisdiction over a particular kind of work is but one of several mechanisms relied on by the building trades unions to protect their members' share of the available work. Protecting work jurisdiction claims is an integral part of the union security provisions in construction industry collective agreements. The closed shop hiring hall system and limiting the subcontracting of the claimed work to contractors with whom the union has a collective bargaining relationship complete the protection. This approach to job security might not be acceptable outside of the construction industry, but that is not reason to condemn its use in the industry. Those mechanisms both reflect and attempt to balance the economic and structural forces which operate in the construction industry.

35. This work jurisdiction dispute arises in the context of the unionized part of the ICI sector of the construction industry in Metropolitan Toronto and nearby municipalities. During the 13 years represented by the past practice evidence in this case, unionized contractors have been performing work in the sector and area with employees who are represented in collective bargaining by the building trades unions. Since January 1978, those relationships have been regulated by the province-wide bargaining scheme. Under that scheme, each building trades union can represent only employees in the trade for which it has been designated. It is in this context that the work in dispute has been performed on hospital projects exclusively by trade contractors under subcontract from general contractors, but for the single exception on the Credit Valley Hospital where the general contractor performed it with its own forces, members of the Carpenters. But for that exception, the work has been performed exclusively by IBEW electricians and UA plumbers employed by the trade contractors. That is the overwhelming past practice and clearly it is the product of the various contractor and trade union players in this segment of the construction industry playing out to the fullest extent the operational specialization characteristic of the industry.

36. Pigott previously has not assigned the work to the Carpenters and Labourers. Nor has it employed IBEW electricians or UA plumbers to perform the work. It has subcontracted the work to contractors who in turn have assigned it to IBEW electricians and UA plumbers. To this extent at least, Pigott has contributed to the area past practice of the work being performed exclusively by IBEW electricians and UA plumbers with the single exception of the Credit Valley Hospital project.

37. The letting of the work on the other projects to subcontractors and assignment of the work to the IBEW and the UA, was not contested by the Carpenters and Labourers. Clearly, there has been an acceptance of that subcontracting and of those assignments. With it there has developed a consistent and long standing practice of the IBEW and the UA installing patient service modules in hospitals where the modules will contain electrical and medical gas devices. Now, after 13 years of their members installing patient service modules on all but one of the hospital construction projects in Metropolitan Toronto and nearby municipalities, as a result of Pigott's assignment of that work to the Carpenters on St. Joseph's Hospital, the IBEW and the UA see

their work being done by members of other trade unions. To them, that is a direct challenge to the stability of what they believe is their established work jurisdiction.

38. If the Carpenters, the Labourers and Pigott are correct and the IBEW and the UA cannot make a successful claim for the work in dispute under section 91 because they lack collective agreements with Pigott, there may well be no other lawful recourse open for the IBEW and the UA to establish that their consistent and long standing practice of installing patient service modules gives them jurisdiction over that work on hospital construction projects in the unionized sector of the construction industry in Metropolitan Toronto and nearby municipalities. From a practical point of view, they cannot gain jurisdiction by obtaining bargaining rights for Pigott's employees since it does not employ electricians and plumbers and the IBEW and the UA are prohibited by statute from representing any other trades in the ICI sector of the construction industry. If it is intended that the Board's jurisdiction under section 91 be used to fashion remedies which will lessen work assignment disputes in the construction industry, the result argued for by the Carpenters, the Labourers and Pigott would be counter to that objective. Furthermore, the result suggests that the Board would exercise its discretion under subsection 91(1) to refuse to inquire into a complaint if the trade union claiming the work in dispute does not have a collective agreement covering the work with the employer who is or was assigning it and the trade union to which it has been assigned does. From even the small sampling of the Board's jurisprudence on work assignment complaints relied on by the complainants, it would appear that the Board has not taken that approach. It would appear also that unionized employers in the construction industry and the trade unions which represent their employees either have accepted that a trade union can bring a work assignment complaint in those circumstances, or they have not persuaded the Board in any reported decision to refuse to inquire into such work assignment complaints. Thus, to this panel of the Board, it appears that, prior to this complaint, the Board has not ever refused to consider whether any of the other usual criteria were so compelling as to override the lack of a bargaining relationship between the union claiming the work and the employer who was assigning it.

And for a direct example of the Board endorsing an assignment of work on the basis of other compelling *indicia*, notwithstanding that it was to the Union with which the contractor did *not* have a collective agreement, again see the *Brunswick Drywall Limited* case referred to earlier, [1982] OLRB Rep. Aug. 1143.

11. Notwithstanding the above insightful comments, the Board in "Pigott I" in the end declined to make the declaration for a combined crew sought by the complainants because one of them at least, the IBEW, had a clause in their collective agreement, which they made clear to the Board they would not waive, and which effectively prevented them from supplying electricians to any contractor "whose business is not recognized as electrical work". That meant that an award by the Board in favour of the complainants was an award requiring Pigott to subcontract. The Mechanical Contractors Association of Ontario, as it turns out, some years ago negotiated a similar protection in Article 25 of its provincial agreement with the Plumbers'. However, it is clear from the evidence that the U.A. does have a policy of waiving that restriction, and that such waiver has in fact been expressly recognized in its collective agreement to a degree in 1982, and to a further extent more recently. It is clear, therefore, that Pigott has the choice, should an award go in favour of the complainant, of engaging plumbers to do this work either directly, or through a subcontractor as it has on occasion done in the past.

12. For all of the foregoing reasons, we are of the view and declare that the claim asserted here by the complainant, that the work of installing the washroom accessories at the instant hospital in Toronto should have been assigned in accordance with the 1965 work-jurisdiction agreement between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Brotherhood of Carpenters and Joiners of America, is correct and ought to be upheld.

**CONCURRING OPINION OF BOARD MEMBER JIM LEAR; June 25, 1992**



1. In agreeing with all aspects of the decision, I do attach particular importance to the existing agreement between the Internationals of the Plumbers' and Carpenters' which relates specifically to the accessories forming the subject of the dispute in this case.
2. Some similar agreements seem to be almost as old as time itself, and modern technological advances in construction methods and materials may have rendered them of doubtful application today. Not so this agreement. Though dating originally from 1939, it has been the subject of reinforcing supplements as recently as 1965 and 1978; the accessories in question, too, have remained essentially unchanged over the years. Moreover, area practice, and specifically in Board Area 8, shows an overwhelming and continuing support for this agreement on projects where it was sensibly applicable. This lasted until Carpenters' Local 27 began to "turn up the heat" in the later years of the 1980s in its bid to secure the work for their members, and culminated in Local 27's claim to this work in its 1988 collective agreement. Since then, the balance has tilted rather in favour of Carpenters' performing the work.
3. Regardless of anyone's opinion on who is better qualified to fix the accessories and on the economies to be achieved by doing the work with whatever trade, surely the crucial question is "what is the value of a valid and current agreement relating to the work in dispute?" In the interests of both labour-relations harmony and obligations undertaken within the agreement, and certainly where area practice has honoured the agreement until recent years, it must continue to be applied unless and until it is properly rescinded. The agreement is a product of serious negotiation, concession, and compromise, by each party to it; in signing, the parties are undertaking to abide by its conditions while it is extant; presumably by signing this agreement the Carpenters' gained something, somewhere, in conceding the washroom accessories to the Plumbers'.
4. While Local 27 testified it did not believe in the agreement, it cheerfully admitted it had not bothered to make known its feelings to the Carpenters' International, but chose instead simply to ignore the existence of the agreement in recent years, though until then it had in fact allowed the agreement to be applied widely without argument.
5. It is not hard to imagine how the civil courts would rule on a similar type of agreement, freely made in a commercial context between two parties and breached without reason by one party without any re-negotiation, notification to, or discussion with, the other.
6. Agreements such as the one referred to are created in the hope of avoiding inter-union disputes, and are never lightly entered into. For these reasons, they must never be treated with disdain or with contempt. Procedures exist whereby a party unhappy with any part of an agreement may properly, and formally, register its unhappiness. Here, Carpenters' Local 27 elected not to follow these procedures but, instead, simply consigned this agreement to oblivion. It is to be hoped that, as in this case, the Board will always ascribe to agreements of this nature the premium value they deserve and will take serious objection to attempts to breach their conditions and obligations. While such a policy may result in short-term pain to someone caught in the middle of a dispute, in this case the contractor, Pigott, the long-term benefit to labour-relations stability industry-wide will be considerable and indisputable.

#### **CONCURRING OPINION OF BOARD MEMBER HENRY KOBRYN; June 25, 1992**

I believe all of the points that need to be made with respect to international agreements and the other aspects of the case before us here have been made by my two colleagues in their Opinions, and I fully concur with all of the comments made by both of them.

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**2110-91-R Elizabeth Gierasimczuk, Applicant v. United Food and Commercial Workers' International Union - Local 175, Respondent v. Royce Dupont Poultry Packers, Intervener**

**Petition - Termination - Union certified pursuant to section 8 of the Act in 1989 - Board noting need to be sensitive to lingering effects of egregious unfair labour practices on likelihood of employees voluntarily seeking to decertify union at first available opportunity thereafter - In all the circumstances, Board concluding that petition not voluntary - Application dismissed**

**BEFORE:** *Susan Tacon*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

**APPEARANCES:** *C. J. Abbass* and *Elizabeth Gierasimczuk* for the applicant; *Douglas J. Wray*, *Harold F. Caley* and *Jay Nair* for the respondent; *Irv Kleiner*, *Wayne Maracle* and *Ken Dew* for the intervener.

**DECISION OF THE BOARD;** June 15, 1992

1. This is an application seeking termination of the bargaining rights held by the respondent trade union in respect of the employees of the intervener company.

2. The Board heard testimony from three persons, including the applicant and two witnesses called by the union. The Board has weighed and assessed that testimony, including the relative credibility of the witnesses, in the context of the documentary material filed with the Board and what is reasonably probable in the circumstances. Following the conclusion of the evidence, the Board heard the submissions of counsel. In this regard, it should be noted that Mr. Kleiner, acting on behalf of the intervener company, did not appear on the final day set for hearing and accordingly did not make submissions to the Board, for reasons set out in his letter to the Board of May 21, 1992.

3. In the Board's view it is not useful to recite herein its factual findings in any detail. Rather, the Board merely sets out those factors which were of greatest relevance, although, of course, all the circumstances in the instant case were considered individually and cumulatively. Likewise, there is no need to repeat the submissions of counsel. Both concisely reviewed the evidence in support of their respective assertions and the relevant jurisprudence.

4. There was no dispute that the onus of proving that the petition in support of the termination application was voluntary lies on the applicant. The jurisprudence clearly establishes that the applicant must satisfy this onus through adducing *viva voce* evidence concerning the origination and circulation of the petition, including the circumstances in which each signature was obtained. In such a context, the credibility of the applicant is critical. The Board has carefully reviewed the applicant's testimony in light of the usual factors going to credibility. The Board has some concerns with the applicant's credibility given that, at times, her answers were internally inconsistent or implausible in all of the circumstances. However, the Board's decision in this matter does not ultimately turn on this aspect alone and, thus, the Board need not elaborate further on this point.

5. The petition filed with the Board in support of the termination application cannot be faulted in its form. The date, time and place in which each signature was collected is indicated. Most signed at a restaurant near the company premises during lunch or break; the rest were obtained at the person's home or in close proximity to the restaurant. There was a typed information sheet available outlining the decertification process. The petition and the information sheet were prepared with the assistance of counsel. The applicant testified that the employees

approached her to act on their behalf in initiating the termination application and she was simply carrying out their wishes. The triggering event for the instant termination application, the applicant stated, was the deduction of union dues from the employees' wages in July or August 1991 following the implementation of the first collective agreement between the parties.

6. There was, however, a "first" petition approximately two weeks prior to the one filed with the Board in support of the termination application. The signatures on that petition were collected on company premises in a small room adjacent to the public area of the retail store and, least in some instances, during the working hours of those signing. More critically, several of the employees signing that document work in the plant and were directed to see the applicant at the retail store by "Paul", the manager. The applicant asked "Paul" to send several persons to see her when he (Paul) encountered the individuals at the plant. Paul, in telling the employees during their working hours that the complainant wished to see them, did not give a reason; the employees, when they approached the applicant, were presented with the petition to sign. While the applicant testified that Paul was requested to send over only two persons, the Board prefers the testimony of Austin Frank that four persons, including himself, were directed by Paul to see the complainant. Austin Frank testified that he cannot read and the complainant did not read the document to him or to the others; she directed them to sign and at least Austin Frank complied. Frank later learned the document was a petition against the union. He also signed the "second" petition which is the subject of the instant application.

7. In the Board's view, it would be reasonable for an employee to conclude in the circumstances that Paul (and the rest of management) knew of and condoned the applicant's activities in circulating a petition seeking to decertify the union and that management would learn which employees signed and which did not. Even if the applicant's motive in asking Paul to direct employees to her was entirely innocent, the fact remains that the employees were told by management to see the complainant and then were confronted with the petition opposing the union. The Board, given the evidence, is cognizant as well of the ethnic composition and literacy level of the workforce and the difficulty many have with the English language. A manager's direction to see the applicant and then the presentation of the petition would have considerable impact and underscore the linkage between management and the petition. The difficulties with the "first" petition do not necessarily taint the second. In the Board's opinion, in the instant case, however, the nature of the defect in the first, that is, the linkage of management and the applicant and the petition in the context of what employees would reasonably perceive that relationship to be, is such that the format and circumstances of the second petition cannot cure.

8. Moreover, the relationship of the company and the union prior to the instant termination application is of considerable significance. The union obtained bargaining rights through certification pursuant to section 8 of the *Labour Relations Act* as a result of a Board decision in May 1989 wherein the Board found numerous and egregious unfair labour practices committed by the employer, including clear threats to the job security of employees if the union was supported. The Board need not reiterate those findings (see *Royce Dupont Poultry Packers*, [1989] OLRB Rep. May 492) except to note the flagrant nature of the employer's conduct and the threats to the employees' employment prospects should the union be successful. While the past, even where the union is certified pursuant to section 8 will not automatically or necessarily taint a subsequent termination application, the Board must be sensitive to the lingering effects of egregious unfair labour practices on the likelihood of employees voluntarily seeking to decertify the union at the first available opportunity thereafter. The Board must be cautious and circumspect in assessing the circumstances surrounding the origination and circulation of a petition filed in support of such a termination application. Indeed, in the instant case, there had been attempts by employees, including the applicant, to decertify the union following the certification and prior to the instant application;



those attempts were untimely. The parties did not finally conclude a collective agreement (which also resolved several grievances and new allegations of unfair labour practices) until July 1991. The first petition followed shortly thereafter and, approximately two weeks after that, the instant application was filed on September 28, 1991. This is not a case where, notwithstanding a certification pursuant to section 8, the Board is satisfied that the parties thereafter established a stable collective bargaining relationship and the opposition to the union by employees in the bargaining unit was prompted by concerns unrelated to the unfortunate start to the parties' relationship.

9. In all the circumstances, including concerns with respect to the complainant's credibility, the "first" petition and the context created by the employer's unfair labour practices resulting in the section 8 certification, the Board has concluded that the petition filed in support of the instant termination application is not voluntary. Accordingly, the termination application is dismissed.

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**3174-90-R** Labourers International Union of North America, Ontario Provincial District Council, Applicant v. **Stephens and Rankin Inc.**, Respondent v. Christian Labour Association of Canada, Intervener

**Certification - Construction Industry - Union applying for certification in spring of 1991 and Board conducting pre-hearing vote - Application dismissed after ballots counted in April 1992 - Union filing second application in February 1992 - Whether Board should impose bar on second application - Having regard to competing interests and nature of employment in construction industry, Board satisfied that it would not be appropriate to refuse to entertain second application**

**BEFORE:** *Ken Petryshen*, Vice-Chair, and Board Members *J. Trim* and *J. Kurchak*.

**APPEARANCES:** *S.B.D. Wahl, J. Varricchio* and *M. Popovich* for the applicant; *W. J. McNaughton* for the respondent; *Elizabeth Forster* and *Hank Beekhuis* for the intervener.

**DECISION OF THE BOARD;** June 11, 1992

1. This is an application for certification pertaining to the construction industry in which the applicant requested the taking of a pre-hearing representation vote.

2. The pre-hearing vote was held on April 9, 1991 and the ballot box sealed. A number of hearings have taken place in order to resolve voter eligibility issues. In a decision dated June 10, 1991, the Board determined that the voter eligibility rule which the Board normally utilizes in applications for certification pertaining to the construction industry where a pre-hearing vote is requested would be applied in this case. In other words, the Board decided that those persons working in the bargaining unit on the terminal date and on the date the vote is held would be eligible to vote. In a decision dated October 16, 1991, the Board ruled that the applicant would not be permitted to pursue certain challenges since they were not raised in a timely fashion. The Board indicated that the only issue remaining is whether employees were at work on the two relevant dates. In its decision, the Board directed the parties to meet with a Labour Relations Officer for the purpose of reaching agreement on which employees were eligible to vote having regard to the Board's decisions. Since the parties were unable to finally resolve the issue after meeting with a Labour Relations Officer, the Board set the matter down for a third hearing on April 6, 1992 in



order to hear evidence and representations from the parties concerning which employees were at work on March 20, 1991 and April 9, 1991.

3. Prior to the April 6, 1992 hearing, the applicant filed another application for certification ("the second application") for essentially the same bargaining unit of employees of the respondent. This application was filed on February 21, 1992, requested a pre-hearing vote, and was not filed under the construction industry provisions of the Act. By letter dated March 25, 1992, counsel for the applicant raised certain allegations, requested section 8 relief, requested the Board to again reconsider its voter eligibility rulings, and also requested that this application be consolidated with the second application. At the hearing on April 6, 1992, the Board dealt with the request and representations of the applicant as set out in counsel's letter of March 25, 1992. The Board assumed the facts which the applicant relied on were true. After recessing to consider the applicant's representations, the Board ruled orally at the hearing on April 6, 1992 as follows:

- (1) The Board would not exercise its discretion in favour of consolidating this application with the second application. The second application was filed almost a year after the terminal date of this application. In these circumstances, the Board was unable to discern any labour relations basis for consolidating the two applications. Under section 105(3) [formerly 103(3)], the Board determined it was appropriate in the circumstances to postpone consideration of the second application.
- (2) The Board would not entertain a request for section 8 relief in the first application, having regard to the timing of the request. The Board noted that the facts relied on by the applicant in support of its section 8 request for the most part were related in time to the second application.
- (3) The Board again advised the applicant that there was no basis for the Board to reconsider its earlier rulings on voter eligibility.

4. After advising the parties of the above rulings, the Board proceeded to entertain the evidence and submissions of the parties concerning which employees worked on the two relevant dates. After recessing to consider the evidence, the Board ruled at the hearing on April 6, 1992 that 31 employees worked on the relevant dates and were eligible to vote. In the Board's view, the evidence did not demonstrate that 4 persons worked on the day the vote was held. After providing the parties with its ruling, the Board directed that the ballots be counted. Of the 31 eligible voters, 30 employees voted for the intervener and no one voted for the applicant. There was one spoiled ballot. The results demonstrate that even if the applicant had succeeded on all of its 26 challenges, it would still have lost the vote.

5. The respondent and the intervener advised the Board on April 6, 1992 that they would request that the Board impose a bar or refuse to entertain the second application. Given the time of day, the parties agreed to make their submissions in writing. After reviewing the parties' submissions, the Board has decided not to impose a bar and not to refuse to entertain the second application.

6. Section 105(2)(i) provides as follows:

105.-(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

7. In essence, the respondent and the intervener want the Board to bar or to refuse to entertain the second application. The second application was filed almost one year after the first application. Although the second application was filed as a regular application as opposed to a construction application, the respondent is clearly engaged in a construction industry business. It is evident that the workforce fluctuates in a way that is not uncommon in the construction industry, although it is fair to say that a more stable employee complement exists with this respondent than with most employers in the construction industry. Nonetheless, having regard to the competing interests and the nature of employment in the construction industry, the Board is satisfied that it would not be appropriate to impose a bar or to refuse to entertain the second application having regard to the circumstances before us.

8. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 70 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of April 3, 1991.

9. On the taking of the pre-hearing representation vote directed by the Board not more than fifty per cent of the ballots cast were cast in favour of the applicant.

10. The application is therefore dismissed.

11. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

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## COURT PROCEEDINGS

**2526-89-G (Court File No. 210/92) Ellis-Don Limited, Applicant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents**

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Stay - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respon-

dent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

Board decision reported at [1992] OLRB Rep. Feb. 147.

*Ontario Court of Justice, Divisional Court, Steele J., June 16, 1992.*

**STEELE J.:** The applicant, Ellis-Don Limited (Ellis-Don) has applied for judicial review to set aside and quash a decision of the Ontario Labour Relations board (OLRB) in which the Board upheld a working agreement executed in 1962, whereby Ellis-Don bound itself to hire only unionized sub-contractors. The stated grounds of that application are that the OLRB exceeded its jurisdiction and denied Ellis-Don natural justice by altering a finding of fact after receiving representations at a full board meeting from OLRB members who were not part of the panel that heard the evidence, and that the OLRB made patently unreasonable errors with respect to its finding of fact. By a separate motion, Ellis-Don has applied for an order compelling the attendance of the Chair, Vice-Chair, and Registrar of the OLRB to be examined as to the procedures implemented by the Board in arriving at its final decisions, and specifically with respect to the subject decision, and for production. In that motion, it relies on the decision of the Supreme Court of Canada delivered April 16, 1992, in *Commission Des Affaires Sociales v. Tremblay*. I have reserved decision on that motion.

The present motion is to stay the OLRB decision until the entire judicial review application is adjudicated.

The test in stay applications is similar to that in interlocutory injunction applications. (See *Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.) Neither the court in the *Manitoba* case nor any decision of the Court of Appeal of Ontario has expressly adopted or rejected the test in *American Cyanamid Co. v. Ethicon Limited*, [1975] 1 All E.R. 504. The *American Cyanamid* test was adopted by this court in *Yuill Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al.*, 17 O.R. (2d) 505. This is the proper test in normal commercial transactions. The Court of Appeal has adopted the more stringent test that there must be a strong *prima facie* case made out in *Mareva* injunction applications before other matters are considered.

The question is whether or not the strong *prima facie* test is applicable to decisions made by the OLRB that are protected by the strong privative clause set out in s. 110 of the *Labour Relations Act*, R.S.O. 1990, c. L.2. No decision has been made by a higher court, but various single judges have considered the test in different manners. In *Wells Fargo Armcar, Inc. v. Ontario Labour Relations Board et al.*, 34 O.R. (2d) 100, the approach was to apply the normal commercial test, but to give great weight to the *prima facie* or arguable case issue. In *Unlimited Textures Co. Limited v. International Union, United Automobile Aerospace & Agricultural Implement Workers of America et al.* (unreported, Hollingworth J., August 22, 1983), the test was a strong *prima facie* case. In *Burke v. C.A.W.* (unreported, McKeown J., July 4, 1990), the test was a strong *prima facie* case. In *Westburne Industrial Enterprises Ltd. v. Teamsters Local Union No. 419* (unreported, Craig J., May 16, 1985), the test was a *prima facie* case as a necessary first hurdle to be overcome. In *Knob Hill Farms Limited v. O.L.R.B. et al* (unreported, Callaghan A.C.J.H.C., May 30, 1988), the test was a strong *prima facie* case.

In my opinion, the preponderance of the case law is in favour of the strong *prima facie* case test



and I adopt that test. This means that unless an applicant can get over the hurdle of showing a strong *prima facie* case, then the other considerations for a stay need not be considered. I do not accept counsel's argument that because the present application relates to the issue of natural justice before the Board, as opposed to an issue of an evidentiary nature, the test should be different.

In the present case, the material before me, relating to the application for judicial review, does not show a strong *prima facie* case. The principle of a whole board review procedure by the OLRB has been expressly approved by the Supreme Court of Canada in *Consolidated-Bathurst Packaging Ltd. v. IWA Local 2-69 et al.*, [1990] 1 S.C.R. 282. In view of the strong privative clause protecting OLRB decisions, the mere fact that a different decision was arrived at after the full board review, from the prior draft decision, does not present a strong *prima facie* case.

Ellis-Don has moved for an order that the board member be examined to determine the procedures followed. Even if such an order should be granted, it is speculative as to what material will be discovered. In my opinion, this does not show a strong *prima facie* case at the present time.

For these reasons the motion for a stay is dismissed, with costs to the respondent Union. The OLRB did not ask for costs. This dismissal is without prejudice to a further motion being brought if an order for examination of board members is granted, and significant information is obtained thereunder. Written submissions may be made respecting the quantum of costs.

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**2708-90-R (Court File No. 157/92) Polytech Coatings Limited, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and Ontario Labour Relations Board, Respondents**

**Charges - Evidence - Intimidation and Coercion - Judicial Review - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking judicial review on grounds that Board answered wrong question, applied wrong legal test and made unreasonable findings of fact - Application for judicial review dismissed by Divisional Court**

Board Decision reported at [1992] OLRB Rep. March 362.

*Ontario Court of Justice, Divisional Court, Carruthers, Hartt and McKeown JJ., June 4, 1992.*

**CARRUTHERS J. (Endorsement):** This is an application by way of judicial review of a decision of the OLRB dated 5 March 92.

At the outset of this hearing Mr. Roman clarified for us the issues involved in this application. Initially he put forward four (4), however he abandoned one (1), leaving three (3), which in writing read as follows:

1. The Board applied its expertise to answering the wrong question.

2. The Board applied a subjective rather than an objective test and used the wrong burden of proof.
3. The decision was absolutely contrary to the evidence and contained unreasonable findings of fact and inferences.

In our view the question in issue before the Board was properly characterized by it at Pg. 17 Para. 29 of its reasons as follows: "... the principal issue before the Board in these proceedings is not whether any particular section of the Act has been contravened, but whether the Board should set aside the representation vote conducted on February 28, 1991, and direct that a further representation vote be held."

On this basis, in our opinion, the first issue must be resolved against the applicant. With respect to the other two, the attack on the Board's decision is based upon criticism of its factual findings notwithstanding the presence of evidence available to support them. We are not able to find that any conclusion of the Board in this respect is patently unreasonable.

For these reasons this application must be dismissed.

Costs of this application to CAW/Canada fixed at \$3500.00. Costs of attendance before Steele J. fixed at \$1000.00. No costs to Board.















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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1992

## APPLICATIONS FOR CERTIFICATION

### Bargaining Agents Certified Without Vote

**1350-91-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Wentworth Beaver Ltd. c.o.b. Beaver Lumber (Respondent)

Unit: "all employees of Wentworth Beaver Limited c.o.b. Beaver Lumber at 633 Parkdale Avenue North in Hamilton, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (125 employees in unit) (*Clarity Note*)

**1718-91-R:** United Food and Commercial Workers International Union (Applicant) v. John Howard Society of the Regional Municipality of Waterloo, a Branch of the John Howard Society of Ontario (Respondent)

Unit: "all employees of the John Howard Society of the Regional Municipality of Waterloo, a Branch of the John Howard Society of Ontario in the Regional Municipality of Waterloo, and the counties of Wellington and Grey and Bruce, save and except supervisor, persons above the rank of supervisor, Finance Manager, Office Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (19 employees in unit)

**2718-91-R:** United Steelworkers of America (Applicant) v. Centre de Rééducation Cor Jesu De Timmins Inc./Cor Jesu Re-education Centre of Timmins Inc. (Respondent)

Unit: "all employees of Centre de Rééducation Cor Jesu De Timmins Inc./Cor Jesu Re-education Centre of Timmins Inc. in the City of Timmins, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)(*Clarity Note*)

**2893-91-R:** Labourers' International Union of North America (Applicant) v. Hurley Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Hurley Corporation at the Trillium Terminal 3 complex at the Lester B. Pearson International Airport in the City of Mississauga, save and except non-working supervisors and persons above the rank of non-working supervisor" (74 employees in unit) (*Having regard to the agreement of the parties*)

**3688-91-R:** United Food and Commercial Workers International Union Local 175 (Applicant) v. 537670 Ontario Limited Operating as Journey's End Motel, Windsor I (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 537670 Ontario Limited Operating as Journey's End Motel, Windsor I at 2955 Dougall Avenue in the City of Windsor, save and except assistant manager and persons above the rank of assistant manager and employees for whom any trade union held bargaining rights as of February 17, 1992" (10 employees in unit)

**3764-91-R:** Ontario Public Service Employees Union (Applicant) v. The Corporation of the Town of Gravenhurst (Respondent)

Unit: "all office, clerical and technical employees of The Corporation of the Town of Gravenhurst in the Town of Gravenhurst, save and except Supervisors, persons above the rank of Supervisor, Records and Information Clerk, Recreation Programmer, Executive Secretary to the Chief Administrative Officer, students

employed during the school vacation period, students employed on co-op work study programs and persons in bargaining units for which any trade union held bargaining rights as of February 20, 1992” (21 employees in unit) (*Having regard to the agreement of the parties*)

**3778-91-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Harrowston Development Corporation (formerly First City Development Corporation Ltd.) and First City Trust Company, both c.o.b. as Archway Homes, (Respondents)

Unit: “all construction labourers in the employ of Harrowston Development Corporation (formerly First City Development Corporation Ltd.) and First City Trust Company, both c.o.b. as Archway Homes in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**3945-91-R:** Cornwall Typographical Union, Local 859 (Applicant) v. Thomson Newspapers Company Ltd. c.o.b. as Standard Freeholder (Respondent)

Unit: “all composing room work at Thomson Newspapers Company Ltd. c.o.b. as Standard Freeholder in the City of Cornwall and including classifications such as: hand compositors; typesetting machine operators; makeup men; bank men; proofreaders; proofpress operators; machinists for typesetting machines; operators and machinists on all devices which cast or compose type, slugs or film; operators of tape perforating machines and recutter units for use in composing or producing type; operators of all phototypesetting machines (such as Fotosetter, Photon, Linofilm, Monophoto, Coxhead Liner, Filmotype, Typro, and Hade-go); employees engaged in proofing, waxing and past makeup with reproduction proofs, processing the product of phototypesetting machines, including development and waxing; paste makeup of all type, hand-lettered, illustrative, border and decorative material constituting a part of the copy; ruling; photoproofing; correction, alteration, and imposition of the past makeup serving as the completed copy for the camera used in the plate-making process; camera work (excluding the taking, processing, developing or printing of editorial photographs or advertising photographs when taken by staff photographers); all post-camera work up to the point where a fully completed negative is handed to the person who makes the plates, and any work serving as a substitute for any of the foregoing” (7 employees in unit) (*Having regard to the agreement of the parties*)

**3997-91-R:** Local 2228, International Brotherhood of Electrical Workers (Applicant) v. Corporation of the Town of Rockland (Respondent)

Unit: “all employees of the Corporation of the Town of Rockland, save and except supervisors, persons above the rank of supervisor, Secretary to the Administrative Officer, Assistant Clerk, employees in bargaining units for which any trade union held bargaining rights as of March 16, 1992 and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (21 employees in unit) (*Having regard to the agreement of the parties*)

**4022-91-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. 484446 Ontario Inc., c.o.b. as Westcliff Home Hardware (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 484446 Ontario Inc., c.o.b. as Westcliff Home Hardware in the City of Hamilton, save and except Store Manager, persons above the rank of Store Manager, office, clerical and postal outlet staff” (20 employees in unit) (*Having regard to the agreement of the parties*)

**4165-91-R:** Ontario Public School Teachers’ Federation (Applicant) v. The Renfrew County Board of Education (Respondent)

Unit: “all Teacher Assistants employed by The Renfrew County Board of Education in the County of Renfrew, save and except supervisors, persons above the rank of supervisor and persons in bargaining units for whom any trade union held bargaining rights as of March 30, 1992” (72 employees in unit)

**0058-92-R:** Canadian Union of Public Employees (Applicant) v. Vaughan Public Library Board (Respondent)

Unit: “all employees of Vaughan Public Library Board in the City of Vaughan regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Branch Manager, Section Manager, Special Projects Librarian, Business Manager, Manager of Technical Services, Secretary to the Chief Executive Officer and persons above the rank of Branch Manager, Section Manager, Special Projects Librarian, Business Manager, Manager of Technical Services, Secretary to the Chief Executive Officer and persons for whom any trade union held bargaining rights on April 3, 1992” (25 employees in unit) (*Having regard to the agreement of the parties*)

**0082-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Crowe Foundry Ltd. (Respondent)

Unit: “all employees of Crowe Foundry Ltd. in the City of Cambridge, save and except assistant supervisors, persons above the rank of assistant supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period” (77 employees in unit) (*Having regard to the agreement of the parties*)

**0109-92-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Wilf Auger and Sons Ltd. (Respondent)

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Wilf Auger and Sons Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Wilf Auger and Sons Ltd. in all sectors of the construction industry in the Township of Merritt and the adjoining Townships of Baldwin, Nairn, Foster, Curtin, Mongowin, McKinnon, Hallam and Shakespeare, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

**0120-92-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Karki Residential Improvements Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Karki Residential Improvements Ltd. engaged in exhibit and display work in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (8 employees in unit) (*Having regard to the agreement of the parties*)

**0127-92-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Dolvin Mechanical Contractors Limited (Respondent)

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Dolvin Mechanical Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Dolvin Mechanical Contractors Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (12 employees in unit)

**0142-92-R:** Service Employees Union, Local 478 (Applicant) v. Select Living (1991) Ltd. c.o.b. as the Barclay House (Respondent)

Unit: “all employees of Select Living (1991) Ltd. c.o.b. as the Barclay House in the City of North Bay, save and except Supervisors, persons above the rank of Supervisor, registered and graduate nurses, physiotherapists, occupational therapists, registered nursing assistants, office and clerical staff and persons for whom any trade union held bargaining rights as of April 10, 1992” (13 employees in unit) (*Having regard to the agreement of the parties*)



**0160-92-R:** Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses Windsor - Essex County Branch (Respondent) v. Group of Employees (Objectors)

Unit: "all registered and graduate nurses of the Victorian Order of Nurses Windsor - Essex County Branch employed as Home Care Co-ordinators in the Home Care Programme in the County of Essex, save and except Supervisors and persons above the rank of Supervisor" (44 employees in unit) (*Having regard to the agreement of the parties*)

**0164-92-R:** Canadian Union of Public Employees (Applicant) v. The Ottawa Roman Catholic Separate School Board (Respondent)

Unit: "all employees of The Ottawa Roman Catholic Separate School Board in the City of Ottawa employed as Teaching Assistants, save and except Supervisors, persons above the rank of Supervisor, persons for whom any trade union held bargaining rights on April 13, 1992" (40 employees in unit) (*Having regard to the agreement of the parties*)

**0174-92-R:** Association of Allied Health Professionals: Ontario (Applicant) v. Sudbury and District Health Unit (Respondent) v. Canadian Union of Public Employees, Local 1916 (Intervener)

Unit #1: "all Paramedical employees of Sudbury and District Health Unit in the Regional Municipality of Sudbury and the Districts of Sudbury and Manitoulin, save and except Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of April 14, 1992" (7 employees in unit) (Clarity Note)

Unit #2: "all Paramedical employees of Sudbury and District Health Unit in the Regional Municipality of Sudbury and the Districts of Sudbury and Manitoulin regularly employed for not more than 24 hours per week, save and except Supervisors, persons above the rank of Supervisor, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of April 14, 1992" (6 employees in unit) (Clarity Note)

**0177-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pizza Pizza Limited (Respondent)

Unit: "all employees of Pizza Pizza Limited at its Order Processing Department in the City of London, save and except Manager and persons above the rank of Manager" (7 employees in unit) (*Having regard to the agreement of the parties*)

**0179-92-R:** IWA-Canada (Applicant) v. Coretech/Sonoco Limited (Respondent)

Unit: "all employees of Coretech/Sonoco Limited employed in Kenora, save and except Floor Supervisors, persons above the rank of Floor Supervisor, and office and clerical staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

**0189-92-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Francis Contracting Ltd. (Respondent)

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Francis Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Francis Contracting Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**0195-92-R:** Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the Districts of Sudbury and Manitoulin (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of The Children's Aid Society of the Districts of Sudbury and Mani-

toulin in the City of Sudbury, Town of Little Current, Township of Chapleau, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary to Director of Services, Executive Secretary to Director of Human Resources, Executive Secretary to Director of Finance, Executive Secretary to Executive Director and Computer/Programmer Technician” (21 employees in unit) (*Having regard to the agreement of the parties*)

**0197-92-R:** Teamsters Local Union 938 (Applicant) v. Lakeport Brewing Corporation (Respondent)

Unit: “all employees of Lakeport Brewing Corporation at its Lakeport Beverages Division in the City of Hamilton, save and except Supervisors, persons above the rank of Supervisor, office, sales and technical staff” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0231-92-R:** Ontario Public Service Employees Union (Applicant) v. North Bay and District Health Unit (Respondent)

Unit: “all employees of the North Bay and District Health Unit in the Districts of Nipissing and Parry Sound employed as Homemakers, save and except Assistant Supervisor, persons above the rank of Assistant Supervisor and persons for whom any trade union held bargaining rights as of April 15, 1992” (53 employees in unit) (*Having regard to the agreement of the parties*)

**0294-92-R:** Ontario Nurses’ Association (Applicant) v. Corporation of the County of Huron c.o.b. as Huron-view, Home for the Aged (Respondent)

Unit: “all registered and graduate nurses employed by the Corporation of the County of Huron at its Huron-view, Home for the Aged in the Township of Tuckersmith, save and except Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing” (18 employees in unit) (*Having regard to the agreement of the parties*)

**0295-92-R:** Canadian Union of Public Employees (Applicant) v. Victorian Order of Nurses Windsor-Essex County Branch (Respondent)

Unit: “all office and clerical employees of the Victorian Order of Nurses Windsor-Essex County Branch employed in the Home Care Programme in the City of Windsor, save and except the Administrative Assistant, persons above the rank of Administrative Assistant and the Bookkeeper” (15 employees in unit) (*Having regard to the agreement of the parties*)

**0300-92-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Enviro-Jet Systems Inc. (Respondent)

Unit: “all employees of Enviro-Jet Systems Inc. in Windsor, save and except Forepersons, persons above the rank of Foreperson, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation” (8 employees in unit) (*Having regard to the agreement of the parties*)

**0306-92-R:** United Food & Commercial Workers Union, Local 175 (Applicant) v. Western Grocers Division of Westfair Foods Limited (Respondent)

Unit: “all employees of Westfair Foods Limited at its Western Grocers Division in the Town of Kenora, save and except Manager and persons above the rank of Manager” (4 employees in unit) (*Having regard to the agreement of the parties*)

**0397-92-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Southbend Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of Southbend Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Southbend Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the

Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**0444-92-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. R.M. Catering Ltd. (Respondent)

Unit: “all employees of R.M. Catering Ltd. employed at the Thunder Bay Airport Gift Shop in Thunder Bay, save and except Supervisors and persons above the rank of Supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0472-92-R:** Teamsters Local Union No. 419 (Applicant) v. Safety Kleen Canada Inc. c.o.b. as Safety Kleen Oil Services (Respondent)

Unit: “all employees of Safety Kleen Canada Inc. c.o.b. as Safety Kleen Oil Services in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

**0480-92-R:** United Steelworkers of America (Applicant) v. Pyke Manufacturing Ltd. (Respondent)

Unit: “all employees of Pyke Manufacturing Ltd. in the City of Oshawa, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, professional engineers, (within the meaning of the Ontario Labour Relations Act) and students employed during the school vacation period” (25 employees in unit) (*Having regard to the agreement of the parties*)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2732-91-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. Simcoe County Association for the Physically Disabled (Respondent)

Unit: “all employees of Simcoe County Association for the Physically Disabled employed as drivers in the County of Simcoe, save and except supervisors, persons above the rank of supervisor, office and clerical staff, dispatcher/drivers and persons regularly employed for not more than 24 hours per week” (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	4
Number of persons listed as in dispute	8
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	8

**3928-91-R:** Canadian Union of Public Employees (Applicant) v. Modern Building Cleaning Inc. (Respondent) v. Independent Canadian Transit Union (Intervener)

Unit: “all employees of Modern Building Cleaning Inc., engaged in cleaning services at Riverside Hospital of Ottawa, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff” (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	42
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of ballots marked in favour of applicant	23
Number of ballots marked in favour of intervener	11



**3939-91-R:** Ontario Public School Teachers' Federation (Applicant) v. The Leeds and Grenville County Board of Education (Respondent)

Unit: "all Adult Basic Education instructors employed by The Leeds and Grenville County Board of Education in the Counties of Leeds Grenville, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of March 12, 1992" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	31
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	4

**4135-91-R:** Christian Labour Association of Canada (Applicant) v. W & W Electric Inc. c.o.b. as Alberni Electric (Respondent) v. International Brotherhood of Electrical Workers, Locals 303, 804 (Interveners)

Unit: "all electricians and electricians' apprentices in the industrial, commercial and institutional sector of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	7
Number of persons listed as in dispute	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	1

**0016-92-R:** IWA - Canada (Applicant) v. Mel Hall Transport Limited and 444024 Ontario (Respondent) v. Canadian Paperworkers Union and its Local 333-22 (Intervener)

Unit: "all employees of Mel Hall Transport and 444024 Ontario Limited working at and out of the City of Burlington and in and out of the Rexdale Branch, a location in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, dispatcher, office, clerical and sales staff" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	16
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	0

**Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**0006-92-R:** Canadian Union of Public Employees (Applicant) v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell (Respondent)

Unit: "all Special Teacher Aides (Aides Particuli 2hjMrs) employed by Conseil des écoles séparées catholiques de langue française de Prescott-Russell, save and except Supervisors, persons above the rank of Supervi-

sor, and employees in bargaining units for whom any trade union held bargaining rights as of March 31, 1992” (43 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	45
Number of persons who cast ballots	41
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	8

### Applications for Certification Dismissed Without Vote

**2086-91-R:** International Brotherhood of Painters and Allied Trades Local 1904 (Applicant) v. Canadian Aluminum Systems Limited (Respondent) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Intervener) (2 employees in unit)

**0059-92-R:** IWA-Canada (Applicant) v. William Day Construction Limited, Gogama Forest Products, in Ostrom Township, McChesney Lumber Division-E.B. Eddy Forest Products (Respondent) (24 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**4173-91-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Alcan Aluminum Limited c.o.b. as Alcan Extrusions (Respondent)

Unit #1: “all employees of Alcan Aluminium Limited at its Alcan Extrusions Division in the Town of Pickering, save and except Supervisors, persons above the rank of Supervisor, office, clerical, professional, technical, sales staff and students employed during the school vacation period” (70 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons listed as eligible	70
Number of persons who cast ballots	68
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	45

**4176-91-R:** Can Workers Federal Union Local 354, Canadian Labour Congress (Applicant) v. St. Catharines Hydro Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit #1: “all employees of St. Catharines Hydro-Electric Commission, save and except foremen, persons above the rank of foreman, Secretary to the General Manager, Secretary to the Commission, Human Resources Assistant, students employed during the school vacation periods, and students employed in a cooperative training program” (96 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	94
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	85

**0033-92-R:** Bakery, Confectionery and Tobacco Workers International Union (Applicant) v. RJR MacDonald Inc. (Respondent)

Unit #1: “all employees of the RJR MacDonald Inc. employed in its Leaf Division in the Town of Tillsonburg, save and except forepersons, persons above the rank of foreperson, office, clerical, sales, technical, grading and buying staff, security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period” (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	41
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Number of persons listed as in dispute	10
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	10

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0098-91-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Atoma International Inc. (Respondent)

Unit: "All employees of the respondent at Integram - Windsor Seating, a division of Atoma International Inc. in the Township of Maidstone, save and except supervisors, persons above the rank of supervisor, office and sales staff, industrial engineers and security guards" (333 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	369
Number of persons who cast ballots	364
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	363
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	133
Number of ballots marked against applicant	229
Number of ballots segregated and not counted	1

**3797-91-R:** United Steelworkers of America (Applicant) v. Erie Beach Hotel Limited (Respondent)

Unit: "all employees of Erie Beach Hotel Limited at 19 Walker Street, Port Dover, in the City of Nanticoke, save and except Supervisors, persons above the rank of Supervisor, Head Cook, Groom and golf staff and students employed during the school vacation period" (59 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	72
Number of persons who cast ballots	65
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	12

**4011-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Southern Sanitation Inc. o/a Wasteco (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Southern Sanitation Inc., operating as Wasteco, in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	35
Number of persons who cast ballots	34



Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	2

**4025-91-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Village of Winchester (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the Corporation of the Village of Winchester, save and except the Road Superintendent, the Recreation Director and persons above such ranks, summertime pool employees and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons listed as eligible	16
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	12

### Applications for Certification Withdrawn

**0072-88-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Madeleine Mines Ltd. (Respondent)

**2626-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Moffatt Construction (1990) Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 93 (Intervener)

**0070-92-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. The Douglas MacDonald Development Corporation c.o.b. Chimo Inns (Respondent) v. Group of Employees (Objectors)

**0112-92-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hanover Kitchen Gallery (Respondent)

**0113-92-R:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mason Windows Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

**0168-92-R:** Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Town of La Salle Hydro Electric Commission (Respondent)

**0188-92-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 787 (Applicant) v. Francis Contracting Ltd. (Respondent)

**0282-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zehrs Food Plus Division of Zehrmart Limited (Respondent)

**0299-92-R:** International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Dakota Masonry Ltd. (Respondent)

**0301-92-R:** Alexandria & District Ambulance Service Employee's Association (Applicant) v. Alexandria & District Ambulance Service (Respondent)

**0358-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. State Contractors (Respondent)

**0359-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. M.V. Mark Incorporated (Respondent)

**0360-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. C & G Electrical Contracting Ltd. (Respondent)

**0361-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Bennett & Wright Limited (Respondent)

**0362-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Shaefer-Townsend (Respondent)

**0363-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Powertel Utilities Contractors Ltd. (Respondent)

**0364-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Sharon High Voltage Construction Ltd. (Respondent)

**0365-92-R:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Standard Underground High Voltage (Respondent)

**0415-92-R:** Canadian Union of Public Employees Local 3568 (Applicant) v. Thunder Bay District Health Unit (Respondent)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**0093-92-FA:** UFCW Local 175 (Applicant) v. 888538 Ontario Limited o/a Holiday Inn Owen Sound (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0143-90-R:** International Association of Heat and Frost Insulation and Asbestos Workers, Local 95 (Applicant) v. 512823 Ontario Inc. c.o.b. as I & I Construction Services, Dewar Insulations Inc. (Respondents) v. International Brotherhood of Painters and Allied Trades, Local 1891 (Intervener) (*Granted*)

**2260-90-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. E.S. Fox Limited, E. Spencer Construction Ltd. (Respondents) (*Dismissed*)

**3401-90-R:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jarrett Commercial Contracting Ltd. and Jarrett Construction Ltd. (Respondents) (*Granted*)

**1375-91-R:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. 663925 Ontario Inc. c.o.b. as Q-Tech and G. B. Environmental Services (Niagara) Ltd. (Respondent) (*Dismissed*)

**2073-91-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Bear Corporation and Norcon Industries Inc. (Respondents) v. United Steelworkers of America, United Brotherhood of Carpenters and Joiners of America, Local 2486 (Interveners) (*Granted*)

**2240-91-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Ltd., P.B. Rombough 1990 Ltd., and Nor-Con Industries Inc. (Respondents) v.

United Steelworkers of America, Labourers' International Union of North America, Local 493, Labourers' International Union of North America, Ontario Provincial District Council (Intervenors) (*Granted*)

**2796-91-R:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Losereit Limited (formerly known as Losereit Sales and Services Limited) and , Concord Wall & Ceiling Systems Ltd., Threesome Investment Limited (Respondents) (*Withdrawn*)

**2912-91-R:** International Brotherhood of Painters and Allied Trades Local 1904 (Applicant) v. Canadian Aluminum Systems Ltd., 724705 Ontario Inc. (Respondents) (*Withdrawn*)

**3130-91-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Economy Store Fixtures Limited and Flair Woodworking Limited (Respondents) v. The Canadian Woodwork Manufacturers Association (Intervener) (*Granted*)

**3569-91-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. D'Angelo Construction and Engineering Ltd., D'Angelo Construction, Tony D'Angelo and Tony D'Angelo Construction Ltd. (Respondents) (*Granted*)

**3659-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. G-N Mechanical Ltd. and/or 450928 Ontario Limited c.o.b. as Olympic Mechanical and/or 538580 Ontario Ltd. c.o.b. as G-N Mechanical Sheet Metal (Respondents) (*Granted*)

**3683-91-R:** International Union of Operating Engineers, Local 793 (Applicant) v. John Wheelwright Limited, Wheelwright Construction Inc. (Respondents) (*Withdrawn*)

**3693-91-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Jay Electric Limited and/or Jay Electric 1986, Inc. and/or 117767 Ontario Inc. and/or Kingswood Electric Limited (Respondents) (*Granted*)

**3837-91-R:** International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Regional Glass & Mirror Limited and Julie A. Reinhardt c.o.b. as Westmount Glass & Mirror (Respondents) (*Granted*)

**3865-91-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. Losereit Limited (formerly known as Losereit Sales and Services Limited) and Gudi Holdings Ltd. (also known as Concord Wall & Ceilings Systems Ltd.), Threesome Investment Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America Local 785 (Intervener) (*Withdrawn*)

**4142-91-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. The Kermecho Group and Ajax Energy Corporation (Respondents) (*Dismissed*)

**0373-92-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. C.B. Steel Erectors Ltd., Nu-Tech Building Installations Ltd. and 905062 Ontario Inc. (Respondents) (*Granted*)

## SALE OF A BUSINESS

**0143-90-R:** International Association of Heat and Frost Insulation and Asbestos Workers, Local 95 (Applicant) v. 512823 Ontario Inc. c.o.b. as I & I Construction Services, Dewar Insulations Inc. (Respondents) v. International Brotherhood Of Painters And Allied Trades, Local 1891 (Intervener) (*Granted*)

**3401-90-R:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jarrett Commercial Contracting Ltd. and Jarrett Construction Ltd. (Respondents) (*Granted*)



**1376-91-R:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. 663925 Ontario Inc. c.o.b. as Q-Tech and G. B. Environmental Services (Niagara) Ltd. (Respondents) (*Dismissed*)

**2073-91-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Bear Corporation and Norcon Industries Inc. (Respondents) v. United Steelworkers of America, United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervenors) (*Granted*)

**2240-91-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Ltd., P.B. Rombough 1990 Ltd., and Nor-Con Industries Inc. (Respondents) v. United Steelworkers of America, Labourers' International Union of North America, Local 493, Labourers' International Union of North America, Ontario Provincial District Council (Intervenors) (*Granted*)

**2797-91-R:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Losereit Limited (formerly known as Losereit Sales and Services Limited) and Concord Wall & Ceiling Systems Ltd., Threesome Investment Limited (Respondents) (*Withdrawn*)

**3131-91-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Economy Store Fixtures Limited and Flair Woodworking Limited (Respondents) v. The Canadian Woodwork Manufacturers Association (Intervener) (*Granted*)

**3569-91-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. D'Angelo Construction and Engineering Ltd., D'Angelo Construction, Tony D'Angelo and Tony D'Angelo Construction Ltd. (Respondents) (*Granted*)

**3659-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. G-N Mechanical Ltd. and/or 450928 Ontario Limited c.o.b. as Olympic Mechanical and/or 538580 Ontario Ltd. c.o.b. as G-N Mechanical Sheet Metal (Respondents) (*Granted*)

**3693-91-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Jay Electric Limited and/or Jay Electric 1986, Inc. and/or 117767 Ontario Inc. and/or Kingswood Electric Limited (Respondents) (*Granted*)

**3740-91-R:** Graphic Communications International Union, Local 517 (Applicant) v. Artcraft London Ltd. (Respondent) (*Granted*)

**3837-91-R:** International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Regional Glass & Mirror Limited and Julie A. Reinhardt c.o.b. as Westmount Glass & Mirror (Respondents) (*Granted*)

**3865-91-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. Losereit Limited (formerly known as Losereit Sales and Services Limited) and Gudi Holdings Ltd. (also known as Concord Wall & Ceilings Systems Ltd.), Threesome Investment Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America Local 785 (Intervener) (*Withdrawn*)

**0374-92-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. C.B. Steel Erectors Ltd., Nu-Tech Building Installations Ltd. and 905062 Ontario Inc. (Respondents) (*Granted*)

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**1826-91-R:** Ken Murray (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 887 (Respondent) v. Moore Business Forms and Systems Division (Intervener) (*Dismissed*)

**1946-91-R:** Employees of Canron Inc. Plastics Division, of Etobicoke, Carlingview Drive 324 (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) v. Canron Inc., Pipe Division (Intervener)

Unit: "all its employees in Metropolitan Toronto, save and except foremen, persons above the rank of foremen, engineering staff, office and sales staff, persons regularly employed for not more than 24 hours a week and students employed during the school vacation period" (30 employees in unit) (*Dismissed*)

Number of persons listed as eligible	30
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	13
Number of ballots segregated and not counted	3

**3081-91-R:** George R. Longlad (Applicant) v. Graphic Communications Intl. Union Local 500M (Respondent) v. Fieldstone Graphics Inc. (Intervener) (*Withdrawn*)

**3208-91-R:** Sharon Ropp, Dale Taylor, Patricia Robinson, Shirley Morton (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.) and Local 1132 (C.A.W.) (Respondent) v. Allied-Signal Canada Inc. (Intervener)

Unit: "all employees of Allied-Signal Automotive of Canada Inc., in the City of Stratford, Ontario, save and except for supervisors, persons above the rank of supervisor, office and sales staff, laboratory and technical staff and students employed during the school vacation period(s)" (560 employees in unit) (*Granted*)

Number of persons listed as eligible	552
Number of persons who cast ballots	525
Number of spoiled ballots	7
Number of ballots marked in favour of respondent	251
Number of ballots marked against respondent	267

**3300-91-R:** Leonard Gallant (Applicant) v. United Association of Journeymen and Apprentices, Local 552 (Respondent) v. 450928 Ontario Limited c.o.b. as Olympic Mechanical (Intervener) (*Dismissed*)

**3899-91-R:** Paul McConachie (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Respondent) v. Ken Acton Plumbing and Heating Inc. (Intervener)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ken Acton Plumbing & Heating Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (*Dismissed*)

**4100-91-R:** Leonard Steeves, Hubert O'Brien (Applicant) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC and its Local 440 (Respondent) v. St. Lawrence Starch Company Limited (Intervener)

Unit: "all employees of St. Lawrence Starch Company Limited employed at or working out of Mississauga, save and except Foremen, persons above the rank of Foreman, office staff, students employed during the school vacation period, operating engineers and quality control personnel" (12 employees in unit) (*Granted*)

Number of persons listed as eligible	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	9

**4127-91-R:** Julie Lantaigne, on behalf of the membership of Local 220 from London & District Service Workers Union located at Notre Dame of St. Agatha (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) v. Notre Dame of St. Agatha Inc. (Intervener)

Unit: "all employees of Notre Dame of St. Agatha Inc. in St. Agatha, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (28 employees in unit) (*Dismissed*)

Number of persons listed as eligible	28
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	8

**4139-91-R:** Dennis Nadeau (Shop Steward) (Applicant) v. Local Union 47 Sheet Metal Workers International Association (Respondent) v. Thomas K. Webster (1980) Ltd. (Intervener)

Unit: "all Sheet Metal Workers employed by Thomas K. Webster (1980) Ltd. in residential construction in the geographic area of operations under Local 47 territorial jurisdiction" (5 employees in unit) (*Granted*)

Number of persons listed as eligible	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

**0139-92-R:** Dianne M. Kemp, Theresa M. Smydo, Donna Tonizzo (Applicant) v. Wellington Separate Support Staff Association (Respondent) v. The Wellington County Separate School Board (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

**0167-92-R:** Keith Cullum (Applicant) v. Energy and Chemical Workers Union (Respondent) v. Petro Canada Products Lake Ontario Refinery Oakville (Intervener) (*Withdrawn*)

**0206-92-R:** Paul Jackson (Applicant) v. The International Brotherhood of Electrical Workers and The IBEW Construction Council of Ontario and it's Affiliated Local Union 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, and 1739 (Respondent) v. Vol Electric Limited (Intervener) (*Withdrawn*)

**0226-92-R:** Paul Jackson (Applicant) v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario and it's Affiliated Local Union 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687 and 1739 (Respondent) v. Vol Electric Limited (Intervener) (*Withdrawn*)

**0227-92-R:** A Group of Employees Employed by Carborundum Abrasives Inc. (Applicant) v. Local 12, Energy & Chemical Workers' Union (Respondent) v. Carborundum Abrasives Inc. (Intervener) (*Withdrawn*)

**0229-92-R:** Rolly Simoneau (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) v. Guillot Builders Limited (Intervener) (*Withdrawn*)

**0230-92-R:** Denis Tremblay (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Respondent) v. Guillot Builders Limited (Intervener) (*Withdrawn*)

**0236-92-R:** Grant Hurd (Applicant) v. Labourers' International Union of North America, Local 493 (Respondent) v. Guillot Builders Limited (Intervener) (*Withdrawn*)

**0344-92-R:** The Office Employees of Domcor-Division of Domco Ind. Ltd. (Applicant) v. Teamsters Local Union 419 (Respondent) v. Domco Industries Limited (Intervener) (*Granted*)



## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**4153-91-U:** Graphic Communications International Union, Local 517 (Applicant) v. Artcraft London Ltd. (Respondent) (*Granted*)

## DIRECTION RESPECTING UNLAWFUL LOCKOUT

**1491-91-U:** Energy and Chemical Workers Union Local 593 (Applicant) v. Union Carbide Canada Limited (Respondent)

**4154-91-U:** Graphic Communications International Union, Local 517 (Applicant) v. Artcraft London Ltd. (Respondent) (*Granted*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2987-89-U:** Pauline Boudreau (Complainant) v. Amalgamated Transit Union, Division 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

**0703-90-U:** Carmen Coccimiglio (Complainant) v. United Steelworkers of America Local 2251 (Respondent) (*Withdrawn*)

**1279-90-U:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Complainant) v. 512823 Ontario Inc. c.o.b. as I & I Construction Services, Dewar Insulations Inc., International Brotherhood of Painters and Allied Trades, Local Union 1891 (Respondents) (*Dismissed*)

**1975-90-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Metropolitan Toronto Sewer and Watermain Contractors' Association, A Council of Trade Unions (Acting as the Representative of Teamsters, Local Union 230 and Labourers' International Union of North America, Local Union 183) (Respondents) (*Withdrawn*)

**2629-90-U:** United Food and Commercial Workers International Union Local 175 (Complainant) v. 746936 Ontario Limited c.o.b. as Stone Lodge Retirement Residence (Respondent) (*Dismissed*)

**2725-90-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Complainant) v. Canadian Welding & Mfg. Co. Ltd. (Respondent) (*Granted*)

**2765-90-U:** Sheet Metal Workers' International Association, Local 473 (Complainant) v. J.M.R. Electric Ltd. (Respondent) (*Withdrawn*)

**3250-90-U:** Vera N. Lukic (Complainant) v. CUPE 1000, Dan Heffernan (Respondents) (*Withdrawn*)

**0629-91-U:** Timothy M. Kay (Complainant) v. IBEW Local Union 894 (Respondent) v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (Intervener) (*Dismissed*)

**1036-91-U:** Madeleine Cloutier (Complainant) v. Local 195, CAW, Jackie Forrest (Chairperson), Rose Ducharme (Committee) (Respondents) (*Withdrawn*)

**1354-91-U:** Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Complainant) v. Wentworth Beaver Ltd. c.o.b. Beaver Lumber (Respondent) (*Granted*)

**1492-91-U:** Energy And Chemical Workers Union, Local 593 (Complainant) v. Union Carbide Canada Limited (Respondent) v. Group of Employees (Interested Party) (*Granted*)

**1710-91-U:** United Steelworkers of America (Complainant) v. Northland Power Partnership (Respondent) (*Withdrawn*)

**2239-91-U:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Complainant) v. Acme Building & Construction Ltd., P.B. Rombough 1990 Ltd. and Nor-Con Industries Inc. (Respondents) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**2359-91-U:** Marc J. Legros (Complainant) v. Brian Eysers (Respondent) (*Withdrawn*)

**2491-91-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Barr Gordon Limited (Respondent) (*Withdrawn*)

**2571-91-U:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 124 (Complainant) v. Philips Electronics Ltd (Respondent) (*Withdrawn*)

**2916-91-U:** International Association of Machinists and Aerospace Workers, Local 2332 (Complainant) v. Autofix Limited (Respondent) (*Withdrawn*)

**2937-91-U:** Energy and Chemical Workers Union Local 571 and John Clark (Complainants) v. The United Food and Commercial Workers International Union Locals 175/633 and James Crocket (Respondents) (*Withdrawn*)

**2938-91-U:** John Clark (Complainant) v. James Crocket President and Chief Executive Officer, United Food and Commercial Workers International Union Locals 175/633 (Respondents) (*Withdrawn*)

**3009-91-U:** John Shaw (Complainant) v. Canadian Union of Public Employees and its Local 3115 (Respondent) v. The Corporation of the Town of Wasaga Beach (Intervener) (*Dismissed*)

**3259-91-U:** Zulkarnein Isack (Complainant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Dismissed*)

**3539-91-U:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1132 (Complainant) v. Sharon Ropp, Dale Taylor, Patricia Robinson, Shirley Morton and Allied-Signal Canada Inc. (Respondents) (*Withdrawn*)

**3639-91-U:** Sheet Metal Workers' International Association, Local 30 (Complainant) v. Plan Mechanical Ltd. (Respondent) (*Withdrawn*)

**3657-91-U:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Complainant) v. G-N Mechanical Ltd. and/or 450928 Ontario Limited c.o.b. as Olympic Mechanical and/or 538580 Ontario Ltd. c.o.b. as G-N Mechanical Sheet Metal (Respondents) (*Dismissed*)

**3672-91-U:** Minette D. Williams (Complainant) v. Hotel, Employees' Restaurant Employees Union Local 75 (Respondent) (*Withdrawn*)

**3694-91-U:** Ontario Public Service Employees Union and its Local 260 (Complainant) v. Bruce Peters, Chairperson, Niagara South Board of Education Bargaining Team and the Niagara South Board of Education (Respondents) (*Withdrawn*)

**3785-91-U:** Ontario Liquor Boards Employees' Union (Complainant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

**3852-91-U:** Annette Wilmot (Complainant) v. Ontario Nurses Association Local 068 (Respondent) (*Withdrawn*)

**3853-91-U:** Southern Ontario Newspaper Guild, Local 87 of the Newspaper Guild (Complainant) v. Toronto Star Newspapers Limited (Respondent) (*Withdrawn*)

**3897-91-U:** Canadian Paperworkers Union and its Belleville Local 1335 (Complainant) v. SPB Canada Inc. (Respondent) (*Withdrawn*)

**3904-91-U:** Don Kidd, Larry Burns, Jeff Labarge (Complainants) v. Canadian Auto Workers, Local 1285 (Respondent) v. Chrysler Canada Ltd. (Intervener) (*Withdrawn*)

**3921-91-U:** Retail, Wholesale and Department Store Union AFL-CIO-CLC, and its Local 414 (Complainant) v. Domgroup Ltd. (Respondent) (*Withdrawn*)

**3922-91-U:** Ontario Public Service Employees Union (Complainant) v. Grey-Bruce Regional Health Centre (Respondent) (*Withdrawn*)

**3999-91-U:** The Board of Education for the City of Windsor (Complainant) v. Dorothy Greenway, Lenore Alexander, and Ontario Secondary School Teachers' Federation (Respondents) (*Withdrawn*)

**4097-91-U:** Service Employees' Union, Local 210 (Complainant) v. Windsor Raceway Inc. (Respondent) (*Withdrawn*)

**4141-91-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Zalev Brothers Limited (Respondent) (*Withdrawn*)

**4161-91-U:** Kevin Brant (employee of Sweet Ripe Drinks, Mississauga, Ontario) (Complainant) v. United Food and Commercial Workers (UFCW) Local 114P (Respondent) (*Withdrawn*)

**4162-91-U:** Kevin Brant (employee of Sweet Ripe Drinks, Mississauga, Ontario) (Complainant) v. United Food and Commercial Workers (UFCW) Local 114P (Respondent) (*Withdrawn*)

**4169-91-U:** Frank Carlisle, Greg Catton (Complainants) v. Metropolitan Toronto Civic Employees Union (CUPE Local 43), Metropolitan Toronto - Department of Ambulance Services (Metro Ambulance) (Respondents) (*Withdrawn*)

**0030-92-U:** Vicky Kinsella (Complainant) v. U.F.C.W. Local 175 and, Miracle Food Mart (A&P) (Respondents) (*Withdrawn*)

**0083-92-U:** Gustav Seide (Complainant) v. General Motors of Canada Ltd. (Respondent) (*Withdrawn*)

**0091-92-U:** Office & Professional Employees International Union Local 523 (Complainant) v. Habitat Interlude Inc. (Respondent) (*Withdrawn*)

**0092-92-U:** John W. Cannon (Complainant) v. Pave-Al Limited (Division of Orlando Corporation) (Respondent) (*Withdrawn*)

**0095-92-U:** Graphic Communications International Union, Local 500M (Complainant) v. Fieldstone Graphics Inc. (Respondent) (*Withdrawn*)

**0099-92-U:** Antoinette Parent and others (Complainant) v. United Food & Commercial Workers Union Locals 175/633 (Respondent) (*Withdrawn*)

**0103-92-U:** Horst Dragon (Complainant) v. International Association of Bridge Structural and Ornamental Iron Workers Local 721 (Respondent) (*Withdrawn*)

**0105-92-U:** Teamsters Local Union No. 419 (Complainant) v. W. Ernest Hennessey Holdings Ltd. c.o.b. as Young Drivers of Canada (Respondent) (*Withdrawn*)

**0116-92-U:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Complainant) v. Pacific Hardwood Ltd., operating as Reliable Lumber Products (Respondent) (*Withdrawn*)



**0176-92-U:** Christian Labour Association of Canada (Complainant) v. Second Avenue Lodge Inc. c.o.b. as Marsdale Senior Centre (Respondent) (*Withdrawn*)

**0178-92-U:** United Food and Commercial Workers, Local 206 chartered by the United Food & Commercial Workers International Union C.L.C.-A.F.L.-C.I.O. (Complainant) v. Swiss Chalet Restaurant (Respondent) (*Withdrawn*)

**0210-92-U:** Mr. Algis Linkunaitis (Complainant) v. Debra Chesney, payroll supervisor, Messrs. Rod Hamilton, Joe Griffo, Duane Thurlow c/o Beatrice Foods Inc., Brampton Division (Respondents) (*Withdrawn*)

**0222-92-U:** Office & Professional Employees International Union and its Local 523 (Complainant) v. Habitat Interlude Inc. (Respondent) (*Withdrawn*)

**0354-92-U:** Katherine Butler (Complainant) v. CUPE Local 1076 (Respondent) (*Withdrawn*)

**0376-92-U:** Roger J. Nelson (Complainant) v. Reynolds Aluminium (Respondent) (*Dismissed*)

**0379-92-U:** Brewery, Malt and Soft Drink Workers, Local 304 (Complainant) v. 511825 Ontario Inc., carrying on business as Connor Group Homes (Respondent) (*Withdrawn*)

**0396-92-U:** Ontario Public Service Employees Union (Complainant) v. Palmerston and District Hospital (Respondent) (*Withdrawn*)

**0474-92-U:** Thelma McGuigan (Complainant) v. Lorna Bray (SEIU part-time union representative), Tom Small (SEIU business agent), Leeann White (SEIU chief union steward) (Respondents) (*Withdrawn*)

**0489-92-U:** Peter Rosemann (Complainant) v. Stelco Hilton Works (Respondent) (*Dismissed*)

**0513-92-U:** Energy & Chemical Workers Union (Complainant) v. Dussek Campbell Limited (Respondent) (*Withdrawn*)

**0522-92-U:** United Food & Commercial Workers International Union, Local 175 (Complainant) v. Zehrs Food Plus, division of Zehrmart Limited (Respondent) (*Withdrawn*)

**0557-92-U:** Anita Meertens (Complainant) v. Canadian Auto Workers Union (Bendix Heavy Vehicle Systems) (Respondent) (*Withdrawn*)

**0579-92-U:** Alice Kolisnyk, Local Executive Member, OPSEU Local 244 (Complainant) v. Fred Upshaw, OPSEU President and Ontario Public Service Union (Respondents) (*Dismissed*)

## **APPLICATIONS FOR RELIGIOUS EXEMPTION**

**0094-92-M:** John R. Hutten (Applicant) v. Metro Civic Employees Union, Local 43 C.U.P.E. (Respondent Trade Union) v. The Municipality of Metropolitan Toronto (Respondent Employer) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0277-92-M:** The Canadian Linen Supply Co. Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Trade Union) (*Granted*)

## **FINANCIAL STATEMENT**

**0131-92-M:** Maurice Lauzier (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO - Local Lodge 75 (Respondent) (*Withdrawn*)

## JURISDICTIONAL DISPUTES

**2841-88-JD:** Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244, (Complainant) v. Acco Canadian Material Handling Group, a Division of Babcock Industries Canada Inc. and Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Respondents) (*Granted*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**0124-91-OH:** Co-Chairpersons: Fred McKenzie, Randy Albert (Complainants) v. Minnova Inc., Winston Lake Div. (Respondent) (*Dismissed*)

**0125-91-OH:** Mike Sampson (Complainant) v. Minnova Inc. Winston Lake Division (Respondent) (*Dismissed*)

**0126-91-OH:** Edmund Cranford (Complainant) v. Minnova Inc. Winston Lake Division, Schrieber, Ont. (Respondent) (*Dismissed*)

**3206-91-OH:** Rene Garcia (Complainant) v. Prism Specialty Dyers Inc. and John DiNuccio (Respondents) (*Dismissed*)

**3529-91-OH:** Martin Tomasini (Complainant) v. Brian Winchester, Ottawa Civic Hospital (Respondents) (*Withdrawn*)

**3916-91-OH:** William Goggins (Complainant) v. Ahmad Salem & George Elias and Challenger Transmission Limited (Respondents) (*Dismissed*)

**0203-92-OH:** The York Unit of the Ontario English Catholic Teachers' Association; Sandra Guinan and Assunta (Susan) Nowickij (Complainants) v. The York Region Roman Catholic Separate School Board; Joseph Pacitto and Patrick Brazillo (Respondents) (*Withdrawn*)

**0204-92-OH:** Laura Gnatuk (Complainant) v. France Compressor Products (Respondent) (*Withdrawn*)

**0468-92-OH:** Howard Dale Meier (Complainant) v. Tamarack Roof Trusses Inc. (Respondent) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**1927-90-G:** International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Detect Fire Protection Inc. (Respondent) (*Granted*)

**2095-90-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. E.S. Fox Limited, E. Spencer Construction Ltd. (Respondents) (*Dismissed*)

**0236-91-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Canadian Escalator and Elevator Service Company Limited (Respondent) (*Withdrawn*)

**1899-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Bre-Ex Limited (Respondent) (*Withdrawn*)

**1970-91-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bradsil Limited (Respondent) (*Granted*)

**2072-91-G:** Labourers' International Union of North America, Local 493 (Applicant) v. Bear Corporation and Norcon Industries Inc. (Respondents) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**2153-91-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen - Local 12 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)

**2160-91-G:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building & Construction Ltd., P.B. Rombough 1990 Ltd. and Nor-Con Industries Inc. (Respondents) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**2200-91-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Granted*)

**2328-91-G:** Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Toromont Industries Ltd. c.o.b. as Cimco-Lock Refrigeration, (Respondents) (*Dismissed*)

**2394-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canshare Cabling Inc. (Respondent) (*Dismissed*)

**2768-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Doon Valley Craftsmen Inc. (Respondent) (*Withdrawn*)

**2798-91-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Losereit Limited (formerly known as Losereit Sales and Services Limited) and Concord Wall & Ceiling Systems Ltd., Threesome Investment Limited (Respondents) (*Withdrawn*)

**2957-91-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Arosan Enterprises Limited (Respondent) (*Withdrawn*)

**3223-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. D'Angelo Construction and Engineering Ltd. (Respondent) (*Granted*)

**3278-91-G:** International Brotherhood of Electrical Workers Local 353 (Applicant) v. F.A. Tucker (Ontario) Limited (Respondent) (*Withdrawn*)

**3409-91-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sullivan Installations (Respondent) (*Granted*)

**3521-91-G:** International Union of Elevator Constructors Local 90 (Applicant) v. Otis Canada Inc. (Respondent) (*Granted*)

**3561-91-G:** International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Regional Glass & Aluminum Ltd. (Respondent) (*Granted*)

**3602-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. H. Kerr Construction Limited (Respondent) (*Withdrawn*)

**3658-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. G-N Mechanical Ltd., 450928 Ontario Limited c.o.b. as Olympic Mechanical 538580 Ontario Ltd. c.o.b. as G-N Mechanical Sheet Metal (Respondents) (*Withdrawn*)

**3680-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Majestic Contractors Limited (Respondent) (*Withdrawn*)

**3687-91-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. The Parent Company (Respondent) (*Granted*)



**3762-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. E.G.M. Cape and Company Limited (Respondent) (*Granted*)

**3781-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Jasmatek Doors Installations Enr. (Respondent) (*Granted*)

**3826-91-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Stor-Com Contractors & Woodworking Ltd. (Respondent) (*Granted*)

**3962-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Aries Electric (Respondent) (*Granted*)

**3964-91-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Adelaide Electric (Respondent) (*Granted*)

**3995-91-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Twinborn Construction (Paving) Limited (Respondent) (*Granted*)

**4002-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. D'Angelo Construction and Engineering Ltd., D'Angelo Construction, Tony D'Angelo and Tony D'Angelo Construction Ltd. (Respondents) (*Granted*)

**4017-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Hellenic Floor Coverings Ltd. (Respondent) (*Granted*)

**4132-91-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Markey Bros. Construction Inc. (Respondent) (*Withdrawn*)

**4152-91-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sullivan Installations (Respondent) (*Withdrawn*)

**4177-91-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Northland Bitulithic Limited (Respondent) (*Withdrawn*)

**0005-92-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. 114585 Canada Ltee - c.o.b. Roch Cayer (Respondent) (*Withdrawn*)

**0017-92-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stanley Acmetrack Limited (Respondent) (*Withdrawn*)

**0037-92-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastown Electric Company Limited (Respondent) (*Granted*)

**0089-92-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Gerry Villeneuve Construction Registered (Respondent) (*Withdrawn*)

**0104-92-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 18 (Applicant) v. I & I Construction Services (Respondent) (*Withdrawn*)

**0132-92-G:** The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 172 (Applicant) v. Polymeric Engineering Limited (Respondent) (*Withdrawn*)

**0158-92-G:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Metro Concrete Floors (1990) Inc. (Respondent) (*Granted*)

**0170-92-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Avram's Metalworks (Respondent) (*Granted*)

**0196-92-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Century Construction Co. (div. 404933 Ont. Ltd.) (provincial store fixtures) (Respondent) (*Withdrawn*)

**0216-92-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Asbury Mechanical Services and Gary Mascarin c.o.b. as Asbury Mechanical Plumbing and Heating (Respondent) (*Granted*)

**0220-92-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Zentil Plumbing & Heating Co. (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Intervener) (*Withdrawn*)

**0242-92-G:** International Brotherhood of Electrical Workers, Local 773 (Applicant) v. The Board of Education for the City of Windsor (Respondent) (*Withdrawn*)

**0245-92-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. E & D Services Corp. (Respondent) (*Withdrawn*)

**0246-92-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Canadian BBR (1980) Inc. (Respondent) (*Withdrawn*)

**0252-92-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Novo Mundo Construction Ltd. (Respondent) (*Withdrawn*)

**0258-92-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. James A. Rice Ltd. (Respondent) (*Granted*)

**0260-92-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. State Contractors (Respondent) (*Granted*)

**0263-92-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Dry-coustics Construction Ltd. (Respondent) (*Granted*)

**0307-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Delmar Contracting Limited (Respondent) (*Granted*)

**0328-92-G:** Labourers' International Union of North America, Local 1081 (Applicant) v. Hugo Hintz Construction Ltd. (Respondent) (*Granted*)

**0330-92-G:** Labourers' International Union of North America, Local 837 (Applicant) v. G. & G. Masonry (Respondent) (*Granted*)

**0340-92-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Florida Ceilings Systems Limited (Respondent) (*Withdrawn*)

**0345-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Farry Excavating & Grading Limited (Respondent) (*Granted*)

**0352-92-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. Ltd. (Respondent) (*Withdrawn*)

**0353-92-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Withdrawn*)

**0368-92-G:** International Brotherhood of Painters & Allied Trades Local 1824 Painters (Applicant) v. Conrad Painting Limited (Respondent) (*Withdrawn*)

**0377-92-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Bondfield Construction (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Intervener) (*Withdrawn*)

**0380-92-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Wonnacott Excavating Ltd. (Respondent) (*Granted*)

**0388-92-G:** The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. Apex Painters & Contractors Inc. (Respondent) (*Withdrawn*)

**0393-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Keith Archer Crane Rental (Respondent) (*Granted*)

**0394-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Bud's Contracting (Respondent) (*Granted*)

**0413-92-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. A D B Manufacturing Inc. (also known as) Burandt Interior Inc. (Respondent) (*Granted*)

**0417-92-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Y.S. Bruyere Construction Ltee (Respondent) (*Granted*)

**0419-92-G:** The Ontario Allied Construction Trades Council and The Labourers' International Union of North America, Local 1089 (Applicant) v. Dufferin Construction Company and The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

**0427-92-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Bennett Mechanical Installations Ltd. (Respondent) (*Withdrawn*)

**0430-92-G:** International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Charron Electric Ltd. (Respondent) (*Granted*)

**0438-92-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Tony D'Angelo and D'Angelo Construction and Engineering Ltd. (Respondents) (*Granted*)

**0445-92-G:** Formwork Council of Ontario and Labourers' International Union of North America, Local 1036 (Applicant) v. Durocrete Structural Forming Ltd. (Respondent) (*Granted*)

**0467-92-G:** Labourers' International Union of North America, Local 837 (Applicant) v. James A Rice Ltd. (Respondent) (*Granted*)

**0470-92-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Beatty Hall Construction Co. Ltd. (Respondent) (*Withdrawn*)

**0471-92-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Beatty Hall Construction Co. Ltd. (Respondent) (*Withdrawn*)

**0482-92-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Metric Steel Concord/645293 Ontario Ltd. (Respondent) (*Granted*)

**0483-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Snow Valley Contracting Ltd. (Respondent) (*Granted*)

**0519-92-G; 0520-92-G:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Electrical Power Systems Construction Association, Inscan Contractors (Ont.) Inc. (Respondents) (*Withdrawn*)



**0534-92-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Architectural School Products (Respondent) (*Withdrawn*)

**0558-92-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Huffman Bros. Welding Limited (Respondent) (*Granted*)

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**3439-90-M:** Environment Component, Public Service Alliance of Canada (Applicant) v. Alliance Employees' Union (Respondent) (*Dismissed*)

**0204-91-G:** Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007 (Applicant) v. E. S. Fox Limited (Respondent) (*Dismissed*)

**2861-91-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ashbridge Electrical Contractors Limited (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

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